

# ZIVOTOFSKY II AND NATIONAL SECURITY DECISIONMAKING AT THE LOWEST EBB

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## ABSTRACT

*This Note examines assertions of exclusive presidential power in light of the Supreme Court’s 2015 decision in *Zivotofsky ex rel. Zivotofsky v. Kerry*. This Note argues that, contrary to the suggestion of some commentators, the decision enhances the President’s ability to disregard legislative restrictions at flashpoints of national security decisionmaking.*

*As *Zivotofsky II* saw, the President exclusively holds the power to recognize foreign countries. More significant, however, are the analytic moves that the Court introduces when assessing a President’s defiance of an act of Congress—a setup where the President’s power reaches its “lowest ebb.”*

*The *Zivotofsky II* Court reshaped the lowest-ebb posture by relying heavily on historical practice and functionalist arguments to support its conclusion that the President enjoys exclusive authority over foreign recognition. Such arguments have never before been invoked by the Court to invalidate an act of Congress in the field of foreign affairs and systematically favor the executive in future separation-of-powers standoffs. Moreover, even if courts read *Zivotofsky II* narrowly, executive branch lawyers will not. And because justiciability doctrines often insulate executive action from judicial review, the primary (if not the only) legal assessment of hard national security choices will be made by lawyers in the executive branch.*

*To illustrate the importance of *Zivotofsky II*’s impact on executive power, this Note presents three case studies in areas where the political branches have ambiguous or overlapping authority and where the*

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*structural advantages of the executive branch are uniquely important—covert actions, electronic surveillance, and the disposition of captured enemy combatants.*

## INTRODUCTION

Article II's Take Care Clause obliges the President to enforce (and not violate) the Constitution and laws that Congress enacts.<sup>1</sup> In the rare instance where a federal statute subtracts from the authority that the Constitution commits exclusively to the executive branch, the President's duty is to abide by the Constitution and disregard the statute.<sup>2</sup>

Section 214(d) of the 2003 Foreign Relations Authorization Act (FRAA) was apparently such a statute.<sup>3</sup> That provision directed the secretary of state to record, upon request, the birthplace of a Jerusalem-born U.S. citizen as "Israel."<sup>4</sup> One month after section 214(d) was enacted, Menachem Binyamin Zivotofsky was born to U.S. citizens living in Jerusalem.<sup>5</sup> His parents, believing that Jerusalem belongs to Israel, requested the State Department record their son's birthplace as "Jerusalem, Israel."<sup>6</sup> They were refused.<sup>7</sup> As the Department saw things, section 214(d) unconstitutionally interfered with the President's power to recognize the sovereign boundaries of foreign states.<sup>8</sup> In response, the Zivotofskys sued the secretary of state, asking the court to enforce section 214(d) and order the Department to include "Israel" on their son's passport and consular report of birth abroad.<sup>9</sup>

Over the ensuing twelve years, the Zivotofskys' suit produced two significant Supreme Court decisions. The first, *Zivotofsky ex rel.*

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1. See U.S. CONST. art. II, § 3, cl. 4 ("[H]e shall take Care that the Laws be faithfully executed . . .").

2. For instance, Congress probably cannot punish someone for receiving a presidential pardon. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1872) (invalidating a statute requiring courts to deprive southern landowners, pardoned by President Lincoln, from the proceeds of their confiscated property).

3. Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366 (2002) (codified at 7 U.S.C. § 1765d-1(d) (2012)), *invalidated by Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083 (2015) (*Zivotofsky II*).

4. *Id.*

5. *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1229 (D.C. Cir. 2009).

6. *Id.*

7. *Zivotofsky II*, 135 S. Ct. at 2083.

8. *Id.*

9. *Id.*

*Zivotofsky v. Clinton* (*Zivotofsky I*),<sup>10</sup> decided that the political question doctrine did not bar the judiciary from deciding whether section 214(d) was constitutional.<sup>11</sup> Three years later, in *Zivotofsky ex rel. Zivotofsky v. Kerry* (*Zivotofsky II*),<sup>12</sup> the Court held that the President holds an exclusive power to recognize foreign states and that section 214(d) placed an unconstitutional limitation on this recognition power.<sup>13</sup>

*Zivotofsky II* was the first time that the Supreme Court sustained a President's disregard of a federal statute in the field of foreign relations.<sup>14</sup> The familiar framework for assessing such questions of presidential power is Justice Robert Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>15</sup> a case in which the Supreme Court invalidated President Harry Truman's seizure of steel mills during the Korean War.<sup>16</sup> Justice Jackson's concurrence, which subsequent cases have followed,<sup>17</sup> grouped executive power into three categories: the President's power is (1) "at its maximum" when acting with the "authorization of Congress"; (2) "uncertain . . . in absence of either a congressional grant or denial of authority"; and (3) at its "lowest ebb" when in direct defiance of Congress.<sup>18</sup>

The federal judiciary, however, is not the only expositor of law on presidential power. Administration lawyers constantly advise the President about the limits of executive authority, although they operate under an institutional incentive to find reasonable grounds to support the President's objectives.<sup>19</sup> Justice Jackson's legal career

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10. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012) (*Zivotofsky I*).

11. *Id.* at 191.

12. *Zivotofsky II*, 135 S. Ct. 2076 (2015).

13. *Id.* at 2083.

14. *See id.* at 2113 (Roberts, C.J., dissenting) ("Today's decision is a first: Never before has this Court accepted a President's direct defiance of an Act of Congress in the field of foreign affairs.").

15. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 592 (1952) (Jackson, J., concurring).

16. *Id.* at 589.

17. *See, e.g.,* *Medellín v. Texas*, 552 U.S. 491, 524 (2008) (describing Justice Jackson's "familiar tripartite scheme" from *Youngstown* as "the accepted framework for evaluating executive action"); *Dames & Moore v. Regan*, 453 U.S. 654, 668–69 (1981) (stating that the Court "in the past [has] found and do[es] today find Justice Jackson's classification of executive actions into three general categories analytically useful").

18. *Youngstown*, 343 U.S. at 635–37 (Jackson, J., concurring).

19. *See* Neal Devins & Michael Herz, *The Battle that Never Was: Congress, the White House, and Agency Litigation Authority*, 61 *LAW & CONTEMP. PROBS.* 205, 219 (1998) (explaining that "DOJ attorneys may well see the President as their client," not necessarily "the United States

illustrates this point. While serving as attorney general (a little over a decade before *Youngstown*), Jackson famously defended President Franklin Roosevelt's decision to trade American destroyers to Great Britain in exchange for the right to establish military bases in the West Indies and Canada.<sup>20</sup> Roosevelt's destroyers-for-bases deal likely violated laws enacted by Congress to keep America neutral in World War II.<sup>21</sup> In his formal opinion defending the legality of the deal, Jackson invoked functionalist arguments about the President's role in foreign affairs to justify stretching these statutes up to—if not past—their breaking point.<sup>22</sup>

That backdrop sheds light on the opening sentence of Justice Jackson's concurring opinion in *Youngstown*. As one "who has served as legal adviser to a President in time of transition and public anxiety," Jackson intimately understood both the "practical advantages and grave dangers" of plenary presidential powers in foreign affairs.<sup>23</sup> During Jackson's subsequent service on the Court, he took a different view of the "practical advantages" offered by comprehensive executive power that he had once praised as attorney general.<sup>24</sup> Jackson's career illustrates that institutional objectives inform the interpretation and

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writ large"); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1304 (2000) ("In the process of executing the laws, the executive branch is perpetually involved in giving the law meaning.").

20. Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att'y Gen. 484, 486–87 (1940) [hereinafter *Destroyers Opinion*]. President Roosevelt candidly remarked to the Canadian Prime Minister that if the transaction's "legal problems" were not resolved, General Jackson's "head will have to fall." See William R. Casto, *Attorney General Robert Jackson's Brief Encounter with the Notion of Preclusive Presidential Power*, 30 PACE L. REV. 364, 365–66 (2010) (quoting Memorandum of Conversation with Prime Minister Mackenzie King (Aug. 22, 1940), in 46 JAY PIERREPONT MOFFAT, DIPLOMATIC PAPERS (on file with Harvard College Library)).

21. See, e.g., Act of July 19, 1940, Pub. L. No. 76-757, § 7, 54 Stat. 779, 780 (prohibiting disposal of any "vessel, ship, or boat" belonging to the U.S. Navy); An Act to Expedite National Defense, and for Other Purposes, Pub. L. No. 76-671, § 14, 54 Stat. 676, 681 (1940) (repealed 1990) (instructing that "no . . . naval weapon, ship, boat, aircraft, munitions, supplies, or equipment . . . shall hereafter be transferred").

22. See Edwin Borchard, *The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases*, 34 AM. J. INT'L L. 690, 690 (1940) ("[T]he transaction was sustained under statutes which hardly bear the construction placed upon them."); Herbert W. Briggs, *Neglected Aspects of the Destroyer Deal*, 34 AM. J. INT'L L. 569, 886 (1940) ("The 'meaning' which Attorney General Jackson appears to regard as the sole purpose of Sec. 2 [of the statute] . . . is in reality a reading that Sec. 2 countenances a violation of international law.").

23. *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring).

24. *Id.*

application of precedent.<sup>25</sup> For Justice Jackson, reliance on presidential powers at their “lowest ebb” was the “least favorable of possible constitutional postures.”<sup>26</sup>

Though the lowest-ebb posture traditionally demands an explicit textual basis in the Constitution,<sup>27</sup> the *Zivotofsky II* Court invalidated section 214(d) by invoking an executive power that appears nowhere in the language of Article II. Instead, the Court held that the relevant power rests on the President’s time-honored practice of recognizing foreign states and certain “functional considerations”: that the recognition act should be made by a single branch of government; the President has better access to diplomatic intelligence; and the unitary executive is positioned better than the plural Congress to act with “[d]ecision, activity, secrecy, and dispatch.”<sup>28</sup> Yet, *Youngstown* stands for the principle that when the executive branch takes action that conflicts explicitly or implicitly with federal law, the President’s authority relies on his Article II powers minus the enumerated powers of Congress.<sup>29</sup> *Zivotofsky II* reorients that understanding by invoking historical practice and functional advantages as additional justifications for its conclusion that the President’s recognition power is exclusive.

The implications of *Zivotofsky II* for separation-of-powers disputes have received little academic discussion in their relation to the national security arena. Professor Jack Goldsmith has argued that *Zivotofsky II* will strengthen presidential authority in general but has only briefly addressed the decision’s significance in the military and

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25. Chief Justice John Roberts made this point at his confirmation hearing when questioned about his own record of aggressively defending presidential power at the Department of Justice (DOJ). See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States, Before the S. Comm. on the Judiciary*, 109th Cong. 153 (2005) (statement of John G. Roberts, Jr., Judge, D.C. Circuit Court of Appeals) (“[Jackson] recognized, when he became a member of the Supreme Court, that his job had changed . . . [and] he was not the chief lawyer in the executive branch, he was a justice sitting in review of some of the decisions of the Executive.”); see also Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 115 (2015) (“The impact of a Supreme Court decision depends very much on the institution that interprets and applies it.”).

26. *Youngstown*, 343 U.S. at 640 (Jackson, J., concurring).

27. *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring) (stating that the President only prevails over an act of Congress in instances “where the Constitution by explicit text commits the power at issue to the exclusive control of the President”).

28. *Zivotofsky II*, 135 S. Ct. 2076, 2086 (2015) (quoting THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

29. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

intelligence contexts.<sup>30</sup> Other scholars have written that *Zivotofsky II* is a narrow win for the President in the short term, but may enhance the power of Congress to conduct foreign relations in the long term.<sup>31</sup> Professor Michael Glennon, for instance, has suggested that *Zivotofsky II* will strengthen the War Powers Resolution (WPR) and could have bolstered congressional challenges to the Obama administration's executive agreement with Iran.<sup>32</sup> “[B]eyond the narrow confines of recognition,” Glennon concludes, “nothing in *Zivotofsky [II]* makes a future presidential victory more likely.”<sup>33</sup>

A better understanding of *Zivotofsky II*, derived from examining the functionalist analysis that the Court used to assess claims of exclusive executive power, shows that these scholars overreach. This Note argues that *Zivotofsky II* portends a shift away from the presumption that Congress wins direct confrontations with the President in matters of constitutional ambiguity regarding executive power.<sup>34</sup> Instead, *Zivotofsky II* inverts this presumption by invoking the historical practices and structural advantages of the executive branch.<sup>35</sup> That reasoning sweeps past the narrow issue of recognition authority and may embolden the President to meet the exigencies of modern security threats with greater assertions of exclusive war powers.<sup>36</sup>

This Note proceeds in four parts. Part I reviews the law of presidential power as a matter of theory. Part II unpacks *Zivotofsky II* as it relates to assertions of exclusive executive power. Part II.A argues that the decision reshapes the lowest-ebb category in Justice Jackson's *Youngstown* framework, and Part II.B predicts that *Zivotofsky II* will be applied aggressively within the executive branch.

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30. Goldsmith, *supra* note 25, at 142.

31. See, e.g., Michael Dorf, *Zivotofsky May Be Remembered as Limiting Exclusive Presidential Power*, DORF ON LAW (June 8, 2015, 12:52 PM), <http://www.dorfonlaw.org/2015/06/zivotofsky-may-be-remembered-as.html> [https://perma.cc/C772-2X8F] (arguing that *Zivotofsky II* “may be remembered over the long term as a limit on exclusive presidential power”); Michael J. Glennon, *Recognizable Power: The Supreme Court Deals a Blow to Executive Authority*, FOREIGN AFF. (June 23, 2015) <https://www.foreignaffairs.com/articles/ united-states/2015-06-23/recognizable-power> [https://perma.cc/DY6B-9Y46] (stating that *Zivotofsky II* “may actually have enhanced [Congress’s] power”).

32. Glennon, *supra* note 31.

33. *Id.*

34. For further discussion, see *infra* notes 77–83 and accompanying text.

35. For further discussion, see *infra* notes 111–44 and accompanying text.

36. For further discussion, see *infra* Part III and accompanying notes.

Against that background, Part III presents three case studies—concerning covert actions, electronic surveillance, and the treatment of captured enemy combatants—to illustrate how *Zivotofsky II* will concretely enhance presidential power at flashpoints of national security decisionmaking. Part IV answers objections, particularly from the recent scholarship interpreting *Zivotofsky II* as a “win” for Congress.

### I. WHY CONGRESS (ALMOST) ALWAYS WINS: THE *YOUNGSTOWN* FRAMEWORK

The Supreme Court has long mediated the relationship between Congress and the President in the field of foreign affairs. Two prior decisions, *Little v. Barreme*<sup>37</sup> and *United States v. Curtiss-Wright Export Corp.*,<sup>38</sup> represent competing views of the balance of foreign affairs power between the political branches.<sup>39</sup> The former, emphasizing the Constitution’s text, enjoined the President to execute Congress’s foreign policy unless the statute squarely encroached on an Article II power. The latter, emphasizing the law of nations, historical practice, and necessity, concluded that the President had the dominant role in driving foreign affairs. In his *Youngstown* concurrence, Justice Jackson melded portions of each decision to create a taxonomy of presidential foreign affairs powers. Examining *Youngstown* vis-à-vis *Little* and *Curtiss-Wright* situates the legal posture of the executive branch when it acts against Congress in foreign affairs.

#### A. *Dueling Conceptions of Executive Foreign Affairs Power*

*Little* addressed the scope of President John Adams’s Commander-in-Chief powers by using standard formalist tools: the Constitution’s text and structure. *Little*, authored by Chief Justice John Marshall at the height of the (undeclared) Quasi-War with France, held that the President lacked independent power to commence hostilities against vessels engaged in “illicit commerce” with French merchants.<sup>40</sup> At issue was the President’s construction of the Non-Intercourse Act, a law that authorized the Navy to seize American vessels “commencing

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37. *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

38. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

39. See generally Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 YALE J. INT’L L. 5 (1988) (comparing the two cases).

40. *Little*, 6 U.S. (2 Cranch) at 177.

. . . to any French port.”<sup>41</sup> Recognizing that “if only vessels sailing to a French port could be seized on the high seas . . . the law would be very often evaded,”<sup>42</sup> the Navy secretary gave the law a broader construction, charging naval officers to seize ships “bound to or from French ports.”<sup>43</sup> Following that order, the American frigate *USS Boston*, commanded by Captain Little, seized the brigantine *Flying Fish* as it was returning from France.<sup>44</sup> The owners of the *Flying Fish* sued Little for damages. The Court acknowledged that the President’s order was “much better calculated to give [the embargo] effect.”<sup>45</sup> Nevertheless, the Court held that President Adams’s pragmatism could not be squared with the plain meaning of the statute and ordered Little to pay damages.<sup>46</sup>

*Little* exemplifies a formalist understanding of executive authority. In a direct confrontation between Congress’s power to “make Rules concerning Captures”<sup>47</sup> on the high seas and the President’s responsibility to protect the nation as “Commander in Chief,”<sup>48</sup> *Little* makes clear that the “will of Congress controls.”<sup>49</sup> Critically, Chief Justice Marshall reached that conclusion unswayed by the functional advantages of the President’s order. *Little* rejects the idea that the President’s power can expand to the point of lawmaking during hostilities with foreign actors.

*Curtiss-Wright* articulated a different vision of presidential power. In *Curtiss-Wright*, the Supreme Court held that a joint resolution authorizing President Roosevelt to prohibit weapon sales to Bolivia and Paraguay during the Chaco War was not an unconstitutional delegation of legislative authority.<sup>50</sup> The opinion’s legacy lies in Justice George Sutherland’s dictum that the President possesses the “plenary and exclusive” power to conduct foreign relations.<sup>51</sup> This power flows partly from the reality that the President has better intelligence than Congress, and conducting “transactions with foreign nations” often

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41. Non-Intercourse Act, ch. 2, § 1, 1 Stat. 613, 614 (1799) (expired 1800) (emphasis added).

42. *Little*, 6 U.S. (2 Cranch) at 178.

43. *Id.*

44. *Id.* at 176.

45. *Id.* at 178.

46. *Id.* at 178–79.

47. U.S. CONST. art I, § 8, cl. 11.

48. *Id.* art. II, § 2, cl. 1.

49. Glennon, *supra* note 39, at 10 (emphasis omitted).

50. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 329 (1936).

51. *Id.* at 320.



“requires caution” and “unity of design . . . secrecy and dispatch.”<sup>52</sup> But Justice Sutherland located the primary source of executive power in his conception of “external sovereignty.”<sup>53</sup> Under that view, foreign affairs powers were not conferred solely by the Constitution, but had instead—at the moment the colonies secured independence from Great Britain—“passed from the Crown” directly to the Union, not to the individual states.<sup>54</sup>

Scholars have long criticized *Curtiss-Wright’s* theory that the President possesses all of King George III’s international powers and, particularly, the Court’s penultimate characterization of the President as “the sole organ of the nation in its external relations.”<sup>55</sup> Justice Sutherland drew that statement from an address delivered by then-Congressman John Marshall, who was later the author of the Court’s opinion in *Little*.<sup>56</sup> Marshall’s speech concerned the case of Jonathan Robbins, an American charged with committing murder aboard a British frigate.<sup>57</sup> President Adams had made the controversial decision to extradite Robbins to England for trial, as required by the Jay Treaty.<sup>58</sup> Marshall defended President Adams, insisting that he had done no more than “execute” the Jay Treaty, as was “the duty of the Executive department.”<sup>59</sup> Far from casting the executive as the sole organ of American foreign policy, Marshall instead argued that the President was solely responsible for *enforcing* it.<sup>60</sup> That is why four years later, as Chief Justice, Marshall did not resolve *Little* by

52. *Id.* at 319 (quoting S. COMM. ON FOREIGN RELATIONS, 14TH CONG., REP. ON RELATIONS WITH GREAT BRITAIN (Feb. 15, 1816) (report authored by Senator William Wyatt Bibb of Georgia), *IN 6 COMPILATION OF REPORTS OF COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, 1789–1901: DIPLOMATIC RELATIONS WITH FOREIGN NATIONS–HAWAIIAN ISLANDS* 19, 21 (1901)).

53. *Id.* at 318.

54. *Id.* at 316.

55. *Id.* at 319 (quoting 10 ANNALS OF CONG. 613 (1800) (statement of Rep. John Marshall)); see, e.g., Julius Goebel, Jr., *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 572 n.46 (1938) (calling *Curtiss-Wright* a “perversion”); C. Perry Patterson, *In re the United States v. the Curtiss-Wright Export Corporation*, 22 TEX. L. REV. 286, 297 (1944) (describing *Curtiss-Wright* as “(1) contrary to American history, (2) violative of our political theory, (3) unconstitutional, and (4) unnecessary, undemocratic, and dangerous”).

56. 10 ANNALS OF CONG., *supra* note 55, at 613.

57. For background information on the case, see *United States v. Robbins*, 27 F. Cas. 825, 826 (D.S.C. 1799).

58. *Id.*

59. 10 ANNALS OF CONG., *supra* note 55, at 614.

60. See Louis Fisher, *The Law: Presidential Inherent Power: The “Sole Organ” Doctrine*, 37 PRESIDENTIAL STUD. Q. 139, 140 (2007) (summarizing Marshall’s argument as the view that the President’s job was to “implement[]” foreign policy).

appealing to whatever power the President possesses as the “sole organ” of American foreign policy; he appealed, instead, to the President’s “high duty . . . to ‘take care that the laws be faithfully executed.’”<sup>61</sup>

To summarize, the Court had decided separation-of-powers disputes prior to *Youngstown* in two divergent ways. The first, represented by *Little*, drew upon the Constitution’s text and structure, particularly the President’s affirmative duty to enforce federal law. The second, represented by *Curtiss-Wright*, emphasized the functional advantages of the executive, with the result being that the President must have “freedom from statutory restriction” if the “success for our aims” in foreign affairs is to be achieved.<sup>62</sup> These views were synthesized in *Youngstown*.

### B. *The Youngstown Framework*

*Youngstown* did not wash away *Little* and *Curtiss-Wright* from the palimpsest of separations-of-powers jurisprudence. Instead, it made explicit the principle that when both Congress and the President share powers, the President’s ability to brush off a federal statute is narrowly limited.

At the height of the Korean War, President Truman issued Executive Order No. 10,340, directing the Secretary of Commerce to seize most American steel mills to avoid a strike by the United Steelworkers of America.<sup>63</sup> President Truman feared a halt in steel production would “immediately jeopardize and imperil our national defense” and “add to the continuing danger of our soldiers” in Korea.<sup>64</sup> The secretary of commerce immediately designated the heads of the steel companies as “operating managers for the United States,” and directed them to maintain uninterrupted production of steel.<sup>65</sup> These orders were begrudgingly obeyed, but the steel companies went to court and challenged President Truman’s authority to nationalize the steel industry.<sup>66</sup> Executive branch lawyers defended the order as a

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61. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177 (1804) (quoting U.S. CONST. art. II, § 3).

62. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

63. Exec. Order No. 10,340, 17 Fed. Reg. 3139, 3141 (Apr. 8, 1952).

64. *Id.*

65. *Youngstown*, 343 U.S. at 583.

66. *Id.*

lawful exercise of the President’s “inherent” Article II powers, which had “accrued” from the actions of “preceding administrations.”<sup>67</sup>

On a six-to-three vote, the Supreme Court invalidated Truman’s order in *Youngstown*.<sup>68</sup> Justice Hugo Black, writing for the Court, readily dispatched the Truman administration’s argument that former Presidents had lawfully seized private businesses to resolve labor disputes “without congressional authority.”<sup>69</sup> He maintained that the President’s inherent authority came only from “express constitutional language”;<sup>70</sup> acquired powers must come from “an act of Congress.”<sup>71</sup>

Justice Felix Frankfurter concurred. He suggested that congressional acquiescence to “unbroken, executive practice” could lawfully “be treated as a gloss on ‘executive Power.’”<sup>72</sup> But he ruled against Truman’s order because there was no evidence of such acquiescence to a presidential seizure power.<sup>73</sup>

Justice Jackson’s concurring opinion, drawing from Black’s formalism and Frankfurter’s historical-gloss arguments, laid out the now-canonical framework for evaluating presidential power. He began with the Constitution’s structure: by design, the Constitution “enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”<sup>74</sup> Yet that system of checks is not evenly balanced since the strength of presidential powers “depend[s] upon their disjunction or conjunction with . . . Congress.”<sup>75</sup> In other words, there is a rebuttable presumption that the President must carry out federal legislation and may only override laws that subtract from core executive powers.<sup>76</sup>

Justice Jackson conceptualized the “Congress wins” presumption as a continuum punctuated by three categories.<sup>77</sup> When either implicitly or explicitly backed by Congress (Category One), presidential powers are at their apex because the President wields “all

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67. *Id.* at 646 (Jackson, J., concurring).

68. *Id.* at 589 (majority opinion).

69. *Id.* at 588.

70. *Id.* at 587.

71. *Id.* at 585.

72. *Id.* at 610–11 (Frankfurter, J., concurring).

73. *Id.* at 614.

74. *Id.* at 635 (Jackson, J., concurring).

75. *Id.*

76. See Ernest A. Young, *The Constitution Outside the Constitution*, 117 *YALE L.J.* 408, 441 (2007) (describing the extent of the executive’s power as “a function of Congress’s own action”).

77. *Youngstown*, 343 U.S. at 635–37 (Jackson, J., concurring).

that he possesses in his own right plus all that Congress can delegate.”<sup>78</sup> When Congress is silent (Category Two), the President can only invoke “his own independent [Article II] powers.”<sup>79</sup> Justice Jackson did concede, however, that congressional acquiescence may “invite” presidential action.<sup>80</sup> Finally, when the President takes an action that Congress has implicitly or explicitly forbidden by statute (Category Three), executive “power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress.”<sup>81</sup> In this posture, the President may only claim “conclusive and preclusive” authority.<sup>82</sup> Such assertions of power must be carefully “scrutinized” because “what is at stake is the equilibrium established by our constitutional system.”<sup>83</sup>

*Youngstown* is a useful framework for unpacking separation-of-powers disputes between the political branches in foreign affairs.<sup>84</sup> Congress and the President often have uncertain or overlapping constitutional authority to conduct foreign relations.<sup>85</sup> In these cases, *Youngstown* instructs that Congress, wielding one of its enumerated powers, may impose limitations on presidential authority, save only for

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78. See *id.* at 635 (articulating Category One as presidential action “pursuant to an express or implied authorization of Congress”). Justice Jackson identifies *Curtiss-Wright* as a Category One case. See *id.* at 635–36 n.2 (“[*Curtiss-Wright*] involved . . . the question of [the President’s] right to act under and in accord with an Act of Congress.”).

79. *Id.* at 637.

80. *Id.*; see also *id.* at 637 n.3 (discussing President Lincoln’s decision to suspend the writ of habeas corpus, later ratified by Congress (citing *Ex parte Merryman*, 17 F. Cas. 144 (Taney, Circuit Justice, C.C.D. Md. 1861) (No. 9487))). Although Justice Jackson considered *Merryman* to be a “judicial challenge” to Lincoln’s decision to suspend the writ, *id.*, that view might not hold up under close scrutiny. See Seth Barrett Tillman, *Ex Parte Merryman: Myth, History, and Scholarship*, 224 MIL. L. REV. 481, 495–500 (2016) (“The first and primary *Merryman* myth is that President Lincoln ignored or defied a judicial order from Chief Justice Taney to release John Merryman.”).

81. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

82. *Id.* at 638.

83. *Id.*; see also *id.* at 638 n.4 (stating that President Roosevelt’s decision to fire a Federal Trade Commissioner was “contrary to the policy of Congress and impinging upon an area of Congressional control” (citing *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 631–32 (1935))).

84. See *Dames & Moore v. Regan*, 453 U.S. 654, 668–69 (1981) (describing “Justice Jackson’s classification of executive actions” as “analytically useful” in a case regarding an executive order suspending U.S. claims against Iran); CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 174 (2d ed. 2006) (“Justice Jackson’s concurrence in *Youngstown* . . . has been very influential. Indeed, courts and commentators often give more weight to Jackson’s concurrence than to the majority opinion.”).

85. See *Austria v. Altmann*, 541 U.S. 677, 735 (2004) (Kennedy, J., dissenting) (discussing the “complicated intersection” of the “Executive’s and the Legislature’s foreign affairs responsibilities”).

indefeasible executive functions such as the President’s role as the superintendent of the armed forces.<sup>86</sup> Insofar as substantive emanations from Congress’s Article I powers and the President’s Article II powers conflict, *Youngstown* instructs that Congress should prevail.<sup>87</sup>

The Court more recently affirmed that understanding in *Hamdan v. Rumsfeld*.<sup>88</sup> There, the Court concluded that the President lacked the power to try Salim Ahmed Hamdan by military commission in a manner incongruous with the Uniform Code of Military Justice.<sup>89</sup> *Hamdan*, like *Zivotofsky II*, was a Category Three case. And in assessing the scope of the executive’s power to convene military commissions, the Court cited Jackson’s *Youngstown* framework for the proposition that the President “may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.”<sup>90</sup> In other words, Congress (generally) prevails over the Commander in Chief’s war powers at the lowest ebb. That being so, Congress should have even stronger basis to prevail over the President in decisions concerning foreign recognition, on which the Constitution’s text is silent. *Hamdan*, then, suggests that the *Zivotofsky II* Court should have focused first on whether Congress had the proper authority to regulate passports (and if so, uphold the statute)—not whether the President’s recognition power can displace constitutionally valid legislation.<sup>91</sup>

Indeed, the prevailing understanding before *Zivotofsky II* was that the existence of an Article II power was not grounds to invalidate a duly enacted law unless “the Constitution by explicit text commits” that power to the sole control of the President.<sup>92</sup> Congress can criminalize the torture of enemy combatants,<sup>93</sup> though arguably that delimits the President’s Commander-in-Chief power. But Congress cannot enact laws penalizing individuals whom the President has pardoned, because that would vitiate the clear text of the pardon

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86. See U.S. CONST. art. II, § 2, cl. 1 (“The President shall be commander in chief of the Army and Navy of the United States.”).

87. For further discussion, see *supra* notes 81–83 and accompanying text.

88. *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006).

89. *Id.* at 613, 617–25.

90. *Id.* at 593 n.23.

91. For further discussion of congressional action, see *infra* notes 133–37 and accompanying text.

92. *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring).

93. See 18 U.S.C. §§ 2340–2340A (2012) (defining and criminalizing torture).

power.<sup>94</sup> Tethering the source of exclusive executive power to the Constitution's language corresponds with Justice Jackson's description of presidential power because Category Three clearly contemplates that the President has exclusive powers beyond the reach of Congress.<sup>95</sup> The Court, however, has long resisted the idea that "undefined" penumbras on presidential power allow the President to defy federal laws.<sup>96</sup>

Because Congress only loses in direct confrontations with the President in the rare cases where executive power is exclusive, the source of exclusive presidential power is an important and controversial question. The formalist view, represented by *Little*, identified the constitutional text as the only source of such exclusive power. The functionalist view, represented by *Curtiss-Wright*, placed a high value on effective foreign policy, and so gave the President the lead role in foreign affairs. The in-between approach was articulated by Justice Jackson in *Youngstown*. He conceded to the functionalists that the contours of authority between Congress and the President are not clearly defined,<sup>97</sup> but he otherwise rested his analysis on a formalist view that, even in foreign relations, Congress passes laws and the President executes them.<sup>98</sup> Although the distribution of power is not fixed, it does tilt toward Congress. The next Part examines *Zivotofsky II*'s impact on that presumption.

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94. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 148 (1872) (striking down a statute denying southern landowners, whom President Lincoln pardoned, from the proceeds of their confiscated property); see also U.S. CONST. art. II, § 2, cl. 1 ("[The President] shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.").

95. According to Justice Jackson, the Commander-in-Chief Clause means "more than an empty title" and "undoubtedly puts the Nation's armed forces under presidential command." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

96. See, e.g., *id.* at 634 (predicting that "comprehensive and undefined presidential powers" pose "grave dangers" to the "balanced power structure of our Republic").

97. See *id.* (lamenting the lack of "useful and unambiguous" grants of authority to the President in the Constitution's text); see also *id.* at 640 (stating that, although "the President does not enjoy unmentioned powers," "the mentioned ones should" be given "latitude of interpretation for changing times").

98. Compare *id.* at 637 (observing that when the President confronts Congress, "he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter"), with *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177-78 (1804) (holding that the President may not apply "a construction much better calculated to give" effect to a law concerning commerce with a hostile nation, but must "carr[y] into execution" the statute as written).

II. *ZIVOTOFSKY II* AND EXCLUSIVE PRESIDENTIAL POWER

*Zivotofsky II* presented the rare instance when justiciability doctrines like standing did not preclude the Court from resolving conflict between the political branches over the distribution of foreign affairs power. The Court's opinion discusses the Constitution's text and structure but ultimately reinvigorates functionalism in foreign affairs jurisprudence.

President Truman recognized the State of Israel eleven minutes after it declared independence on May 14, 1948.<sup>99</sup> Recognition is a "formal acknowledgement" that a particular nation "possesses the qualifications for statehood."<sup>100</sup> Despite President Truman's unambiguous support of Israel, his administration (and every administration afterward) declined to endorse any nation's claim to sovereignty over the holy city of Jerusalem.<sup>101</sup> The State Department's policy of neutrality was memorialized in its Foreign Affairs Manual, which directs officials to record only "Jerusalem" and not "Israel" on the records of Jerusalem-born Americans.<sup>102</sup>

President Truman recognized Israel without authorization from Congress, and his independent constitutional authority to do so was never questioned. Whether Congress could legislate otherwise was tested when President George W. Bush signed the 2003 FRAA into law.<sup>103</sup> Section 214 of the Act, entitled "United States Policy with Respect to Jerusalem as the Capital of Israel," instructed the State Department to allow "a United States citizen born in the city of Jerusalem" to request that their place of birth be "record[ed] . . . as

99. See THOMAS A. BAILEY, *A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE* 7 (10th ed. 1980) ("Truman recognized Israel *de facto* in 1948 after a delay of eleven minutes."); Statement by the President Announcing Recognition of the State of Israel, 1 PUB. PAPERS 258 (May 14, 1948) (memorializing Israeli recognition).

100. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 cmt. a (AM. LAW INST. 1987).

101. See U.S. DEP'T OF STATE, 6 FOREIGN RELATIONS OF THE UNITED STATES, 1949: THE NEAR EAST, SOUTH ASIA, AND AFRICA 739 (1977) (recommending United Nations supervision over the administration of Jerusalem so as to maintain "the principle of internationalization"). Indeed, officials in the Truman administration did not attend the inaugural session of the Israeli Parliament which convened in Jerusalem for fear that it would signal to neighboring countries that the United States favored Israeli sovereignty over Jerusalem. See *id.* 739–41 (counseling against sending a U.S. representative to the meeting, as it would "run contrary to the position which the United States has taken in support of the internationalization of Jerusalem").

102. U.S. DEP'T OF STATE, 7 FOREIGN AFFAIRS MANUAL § 1360 app. D (2015).

103. Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002) (codified in scattered sections of 13, 22, 42, and 50 U.S.C.).

Israel.”<sup>104</sup> President Bush refused to follow section 214(d) and explained in a signing statement that the provision, “if construed as mandatory rather than advisory,” unlawfully intruded upon the President’s exclusive constitutional authority to determine the status of Jerusalem.<sup>105</sup>

The *Zivotofsky II* Court affirmed President Bush’s constitutional override and held that section 214(d) unlawfully interfered with the President’s exclusive power to make recognition decisions for the United States.<sup>106</sup> Justice Kennedy, writing for the majority, acknowledged that the State Department policy violated a federal statute, placing the executive power at its “lowest ebb.”<sup>107</sup> Such assertions of authority, the Court reiterated, rest “solely on powers the Constitution grants.”<sup>108</sup> But after analyzing the original understanding of the Constitution’s text as well as historical practice related to recognition and finding these sources inconclusive, the Court turned to “functional considerations.”<sup>109</sup> These pragmatic arguments do the heavy lifting in *Zivotofsky II* and upend *Youngstown*’s Category Three. As a result, *Zivotofsky II* may become a significant precedent, particularly for executive branch lawyers who will lean on the decision to support broad exercises of executive power.

#### A. *Reassessing the Justifications for Exclusive Executive Power*

Though narrower avenues were available,<sup>110</sup> the Court opted for a broad holding that the Constitution bars Congress from playing any role in the formal act of recognition.<sup>111</sup> That conclusion rested on two premises. First, the Constitution’s text and structure, as well as

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104. *Id.* § 214, 116 Stat. at 1365.

105. Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 2 PUB. PAPERS 1697, 1698 (Sept. 30, 2003).

106. *Zivotofsky II*, 135 S. Ct. 2076, 2095 (2015).

107. *Id.* at 2084 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

108. *Id.*

109. *Id.* at 2086.

110. For instance, holding that Congress may not compel the President to contradict his own diplomatic speech. See Marty Lederman, *Thoughts on Zivotofsky, Part Five: Why Did the Majority Choose to Decide Whether the President’s “Recognition” Power Is Exclusive?*, JUST SECURITY (June 13, 2015, 8:26 AM), <https://www.justsecurity.org/23825/thoughts-zivotofsky-part-five-majority-choose-decide-presidents-recognition-power-exclusive> [<https://perma.cc/J84Y-2469>] (“[T]he Court could have held that Congress at a minimum cannot compel the President to contradict himself when engaged in diplomatic activity.”).

111. *Zivotofsky II*, 135 S. Ct. at 2087.



historical practice, vest the President with an independent recognition power.<sup>112</sup> Second, “functional considerations” place the recognition power in the sole control of the President, and the weight of historical practice suggests that Congress has acquiesced to an exclusive executive recognition power.<sup>113</sup>

The majority began its discussion of the recognition power by acknowledging that the State Department policy violated a federal statute, placing the executive’s power at its “lowest ebb.”<sup>114</sup> Such assertions of authority, the Court reiterated, can rest “solely on powers the Constitution grants.”<sup>115</sup> The Court identified three potential sources of an executive power to control recognition determinations. The first, the Reception Clause, obliges the President to “receive Ambassadors and other public Ministers.”<sup>116</sup> Drawing from Founding-era international law scholars including Emer de Vattel, Joseph Chitty, and Hugo Grotius, the Court concluded that reception accomplished recognition because receiving an ambassador signified that the sending nation was a legitimate sovereign.<sup>117</sup> Indeed, though at the ratification debates Alexander Hamilton described the Reception Clause as “more a matter of dignity than authority,” he changed his view after President Washington recognized the revolutionary French government by receiving Ambassador Genêt.<sup>118</sup> As the Court noted, after this event,

112. Both parties and all nine Justices accepted that the President has the independent power to recognize a foreign state. *See* Brief for the Petitioner at 17–18, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2014) (No. 13-628) (arguing that the President’s recognition power is not exclusive, but not contesting that it exists); Brief for the Respondent at 9–12, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2014) (No. 13-628) (arguing that the President’s recognition power is exclusive); *see also Zivotofsky II*, 135 S. Ct. at 2111 (Thomas, J., concurring in part and dissenting in part) (placing the President’s recognition power “among the foreign affairs powers vested in the President by Article II’s Vesting Clause”); *id.* at 2114 (Roberts, C.J., dissenting) (accepting that “the President has authority over recognition”); *id.* at 2118 (Scalia, J., dissenting) (agreeing “that the Constitution empowers the President to extend recognition on behalf of the United States”).

113. *See Zivotofsky II*, 135 S. Ct. at 2086 (reasoning that because “the text and structure of the Constitution grant the President the power to recognize foreign nations . . . [t]he question then becomes whether that power is exclusive”); *see also id.* at 2118 (Scalia, J., dissenting) (noting that the “much harder question” is whether the Constitution gives the President the exclusive power of recognition).

114. *Id.* at 2084 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

115. *Id.*

116. U.S. CONST. art. II, § 3.

117. *See Zivotofsky II*, 135 S. Ct. at 2085 (collecting sources).

118. *Id.* (quoting THE FEDERALIST NO. 69, at 420 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

Hamilton would write that receiving an ambassador necessarily entailed substantive judgments about “whether the new rulers are competent organs of the national will, and ought to be recognized.”<sup>119</sup> In addition, the Court cited the power of the President to “make Treaties” and “appoint Ambassadors” with the “Advice and Consent of the Senate” as additional textual support of an Article II recognition power.<sup>120</sup>

Alone, these enumerated powers support an *independent* basis for presidential authority over recognition; they do not resolve whether the Constitution makes the recognition power exclusive in the sense that the President can preclude Congress from making a different determination.<sup>121</sup> To answer the exclusivity question, the Court claimed that only the President could unilaterally recognize a foreign nation, either by receiving their ambassador or by initiating a treaty. This first-mover advantage signaled that the power was not just independent, but also exclusive.

To support that inference, the Court pivoted to “functional considerations.”<sup>122</sup> First, recognizing a foreign nation necessitates that the United States “speak . . . with one voice.”<sup>123</sup> That voice should be the President’s alone so that recognition decisions can be durable and unambiguous.<sup>124</sup> Foreign actors rely on such determinations when conducting diplomatic or commercial relations with the United States. For instance, countries must be able to trust that their ambassadors will be received, that their diplomats will have legal immunity, and that American courts will be open to them so that they can protect their interests.<sup>125</sup> Moreover, the President is better equipped to

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119. *Id.* (quoting Alexander Hamilton, *No. 1 (Pacificus)*, in *THE LETTERS OF PACIFICUS AND HELVIDIUS ON THE PROCLAMATION OF NEUTRALITY OF 1793*, at 5, 13–14 (1845)).

120. *See id.* (quoting U.S. CONST. art. II, § 2).

121. Joseph Story, cited by the majority, understood the President’s power to receive an ambassador as including a recognition power, but he also thought it was possible that Congress could reverse a President’s recognition determination. *See* 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1560, at 416–17 (1833) (describing diplomatic recognition as “an acknowledgement of the sovereign authority *de facto* of such new nation or party” but leaving “open to discussion” the question of whether Congress could make recognition decisions on its own).

122. *Zivotofsky II*, 135 S. Ct. at 2086.

123. *Id.* (quoting *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 424 (2003)).

124. *Id.* Or, in some circumstances, the President may in fact wish to take a position of “strategic ambiguity.” *See* KERRY B. DUMBAUGH, *CONG. RESEARCH SERV., IB98034, TAIWAN: RECENT DEVELOPMENTS AND U.S. POLICY CHOICES* (2006) (characterizing the United States foreign policy towards Taiwan as one of “strategic ambiguity”).

125. *Zivotofsky II*, 135 S. Ct. at 2086.

communicate with the “secret diplomatic contacts” that may lead to a recognition decision. In sum, only the unitary executive (not the plural Congress) possesses the indispensable attributes of “[d]ecision, activity, secrecy, and dispatch.”<sup>126</sup>

The Court then assessed the historical practice of recognition decisions.<sup>127</sup> Though “history is not all on one side,” the Court found that Congress “acquiesced” to complete presidential control of recognition.<sup>128</sup> As examples, the Court noted that Congress refused to recognize the postcolonial governments of Buenos Aires and Chile partly because it viewed recognition as “an exercise of Executive authority.”<sup>129</sup> Additionally, after allegations that Spain had sunk the *USS Maine* in Havana Harbor during Cuba’s rebellion in 1898, Congress sought to recognize the insurgent Cuban government. President William McKinley objected, believing that such recognition was premature under the law of nations.<sup>130</sup> Instead of recognizing “the Republic of Cuba,” Congress passed a joint resolution that called for “the recognition of the independence of the people of Cuba.”<sup>131</sup> Drawing from these and similar episodes, the *Zivotofsky II* Court concluded that Congress had not claimed a concurrent recognition power but rather had deferred to the President’s judgment.<sup>132</sup>

*Zivotofsky II* changes the methodology for assessing presidential powers at the lowest ebb. To begin with, *Zivotofsky II* ends its analysis where Justice Jackson would begin—namely, with the powers of

126. *Id.* (quoting THE FEDERALIST NO. 70, *supra* note 28, at 424 (alteration in original)).

127. The importance of “historical gloss” on separation-of-powers cases (and especially with presidential power) is often attributed to Justice Frankfurter’s concurrence in *Youngstown*. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring). Justice Frankfurter believed “[i]t is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.” *Id.* at 610 (Frankfurter, J., concurring). He also believed that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on [the] ‘executive Power.’” *Id.* at 610–11. More recently, in *NLRB v. Noel Canning*, the Supreme Court gave what it called “significant weight” to the historical practice of the President’s recess-appointments power. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (emphasis omitted).

128. *Zivotofsky II*, 135 S. Ct. at 2091.

129. *Id.* at 2092 (citing 32 ANNALS OF CONG. 1570 (1818) (statement of Rep. Alexander Smyth)).

130. *Id.* at 2093.

131. Joint Resolution of Apr. 20, 1898, ch. 24, 30 Stat. 738 (“For the recognition of the independence of the people of Cuba . . .”); *see also* Goldsmith, *supra* note 25, at 119 (observing that “the Court ignored a fourth potential method of recognition—namely, by statute”).

132. *Zivotofsky II*, 135 S. Ct. at 2093–94.

Congress. Justice Jackson's tripartite framework presented the strength of presidential powers as dependent upon "their disjunction or conjunction with [the powers] of Congress," not the other way around.<sup>133</sup> Yet, the majority opinion jumps to the issue of whether the President's recognition power is exclusive before addressing whether Congress could recognize a foreign nation as an exercise of its own powers to regulate foreign commerce, establish uniform rules of naturalization, or enforce the Fourteenth Amendment's guarantee of equal citizenship to persons born abroad to American parents (and pass such legislation as would be necessary and proper to those ends).<sup>134</sup> If recognition could be accomplished by statute under one of these powers, theoretically Congress could have enacted it unilaterally, that is, over the President's veto.<sup>135</sup> Thus, the Court's chief textual argument for placing recognition under the sole control of the President—the supposed necessity that each method of recognizing a foreign nation requires presidential cooperation<sup>136</sup>—seems to beg an important question.<sup>137</sup>

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133. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 637–38 (1952).

134. See U.S. CONST. art. I, § 8, cls. 3, 4, 17 (conferring power "[t]o regulate Commerce with foreign Nations," "[t]o establish an uniform Rule of Naturalization," and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in [Congress]"); *id.* amend. XIV, § 5 (conferring power "to enforce, by appropriate legislation, the provisions of this article," including the guarantee that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States"). And these are just the powers relevant to section 214(d). Other Article I powers may affect (or at least implicate) a recognition decision. See, e.g., *id.* art. I, § 8, cl. 1 (conferring power "[t]o lay . . . Duties, Imposts and Excises"); *id.* art. I, § 8, cl. 2 (conferring power "[t]o borrow Money on the credit of the United States"); *id.* art. I, § 8, cl. 5 (conferring power "[t]o coin Money, regulate the Value thereof, and of foreign Coin"); *id.* art. I, § 8, cl. 11 (conferring power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water").

135. See Marty Lederman, *Thoughts on Zivotofsky, Part Six: Why the Majority's Surprising Decision on Executive Exclusivity Is Unpersuasive*, JUST SECURITY (June 13, 2015, 11:39 AM), <https://www.justsecurity.org/23835/thoughts-zivotofsky-part-six-majoritys-surprising-decision-executive-exclusivity-unpersuasive> [<http://perma.cc/NQN7-WWPG>] (commenting that the decision may have the impact of shifting some of Congress's foreign relations powers to the President).

136. *Zivotofsky II*, 135 S. Ct. at 2086 (claiming that Congress "has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation").

137. By contrast, Justice Thomas's opinion focused on Congress's enumerated powers and concluded that section 214(d) is lawful with respect to consular reports, but not with respect to passports because the latter belongs to the residual executive power. *Id.* at 2101–10 (Thomas, J., concurring in part and dissenting in part). Justice Scalia also focused on Congress's enumerated powers and would have upheld section 214(d) with respect to *both* passports and consular reports. *Id.* at 2117, 2123–24 (Scalia, J., dissenting). For further discussion of Justice Thomas's concurring opinion, see *infra* note 267.

The Court’s brief and inconclusive discussion of the Constitution’s language is remarkable. In a prior opinion, Justice Kennedy argued that the President could only prevail over an act of Congress “where the Constitution by *explicit text* commits the power at issue to the exclusive control of the President.”<sup>138</sup> Justice Kennedy’s opinion for the Court in *Zivotofsky II* does not come close to that demanding standard. Instead, he appeals to the structural advantages and historical practice of the executive branch as a basis to hold that a penumbral presidential power displaces a federal statute. Although history is theoretically relevant to whether a presidential power is exclusive or concurrent, it had never before been successfully invoked by the executive branch as a constitutional basis for power at the lowest ebb.<sup>139</sup> After all, *Youngstown* considered—and rejected—the contention that the President’s past acts, coupled with congressional acquiescence, established *exclusive* executive power.<sup>140</sup>

Despite bringing historical-practice analysis into separation-of-powers doctrine, *NLRB v. Noel Canning*<sup>141</sup> does not indicate otherwise. In *Noel Canning*, the Court gave “significant weight” to historical practice and concluded that the President’s recess appointments power applied to “intra-session” recesses of the Senate.<sup>142</sup> But under Justice Jackson’s framework, *Noel Canning* was a Category Two case because the President’s actions were made “in absence of either a congressional grant or denial of authority.”<sup>143</sup> In that context, historical-gloss arguments are consistent with *Youngstown* because, as Jackson noted, congressional silence may “invite” presidential action.<sup>144</sup>

138. Pub. Citizen v. U.S. Dep’t of Justice, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring) (emphasis added).

139. See Curtis A. Bradley, *Agora: Reflections on Zivotofsky v. Kerry: Historical Gloss, the Recognition Power, and Judicial Review*, 109 AM. J. INT’L L. UNBOUND 2, 6 (2015), <https://www.asil.org/sites/default/files/print.bradley.pdf> [<https://perma.cc/7NBA-JPGM>] (commenting on the role of history in *Zivotofsky II* and earlier cases).

140. The Court explained:

It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution “in the Government of the United States, or in any Department or Officer thereof.”

*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588–89 (1952).

141. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

142. *Id.* at 2556, 2559.

143. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

144. See *id.* at 637 (acknowledging that, in certain cases, congressional “indifference or quiescence . . . enable, if not invite, measures on independent presidential responsibility”). For

It is different, however, to cite historical gloss as a basis sustain an exclusive presidential power that disables Congress from legislating on the subject.<sup>145</sup> In Category Two cases, historical-gloss arguments treat Congress's silence as waiver. Congressional inaction suggests that it does not view the President's exercise of independent powers as a threat to its own institutional prerogatives. But historical-gloss arguments in Category Three cases justify a President's disregard of a statute as if it were adverse possession: what starts as a violation of law can, if open and notorious for a certain length of time, lawfully expand the power of the executive branch.

In all events, the historical practice was "not all on one side" and could have been read to interpret the President's recognition power as concurrent rather than exclusive.<sup>146</sup> The Taiwan Relations Act (TRA) is a compelling example.<sup>147</sup> Enacted after President Carter withdrew recognition of the Republic of China (ROC) located on Taiwan, the TRA directed that Taiwan must be treated under U.S. law as if it were still recognized.<sup>148</sup> And if there was any doubt as to whether Congress deemed the ROC to be a legitimate, sovereign power, the TRA mandated that Congress provide Taiwan with military resources "to maintain a sufficient self-defense capability."<sup>149</sup> True, the TRA did not formally recognize Taiwan, but neither did section 214(d).<sup>150</sup> So it is unclear why a statute providing military armaments to Taiwan for self-defense is consistent with official neutrality and the President's decision to withhold recognition, but a law granting Jerusalem-born Americans the option to designate Israel as their place of birth interferes with the recognition power.

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further discussion of congressional acquiescence inviting presidential action, see *supra* note 80 and accompanying text.

145. For further discussion, see *supra* note 140.

146. *Zivotofsky II*, 135 S. Ct. 2076, 2091 (2015). Cf. Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 TEMP. L. REV. 1, 43–44 (2013) (collecting examples of congressional actions that, like section 214(d), implicate recognition determinations).

147. Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14 (1979) (codified as amended at 22 U.S.C. §§ 3301–3316 (2012)).

148. See 22 U.S.C. § 3303(a) ("The absence of diplomatic relations or recognition shall not affect the application of the laws of the United States [which] shall apply with respect to Taiwan in the manner that the laws of the United States applied with respect to Taiwan prior to January 1, 1979.").

149. *Id.* § 3302(a), (b); see also Reinstein, *supra* note 146, at 43–44 (arguing that the TRA was tantamount to recognizing Taiwan).

150. *Zivotofsky II*, 135 S. Ct. at 2095 (conceding that section 214(d) does "not itself constitute a formal act of recognition").

Because the historical gloss on the President's recognition power is unclear, let alone "systematic" and "unbroken," *Zivotofsky II* can be read to place considerable weight on functionalist arguments. Unlike historical practice, these *do* point unequivocally to placing the recognition power solely within the executive branch. But they also prove too much.

For starters, the "one voice" doctrine had never before been invoked to resolve a dispute between coequal branches of the federal government. Rather, the importance of having "one voice" speak for the nation was a reason why the President could preempt state law. In *American Insurance Association v. Garamendi*,<sup>151</sup> for instance, the Court struck down a California statute that required in-state insurance companies to publish information regarding any insurance policy they or an affiliate sold in Europe during the Holocaust.<sup>152</sup> The Court held that the statute was preempted because it "interfere[d] with the President's ability to conduct the nation's foreign policy" and "compromise[d] the very capacity of the President to speak for the Nation with one voice."<sup>153</sup>

The practical necessity of having a consistent foreign policy makes sense as a basis to preempt state law. But there is no reason why the abstract need for consistency must allow one branch of the federal government to preempt another coequal branch, nor is it obvious that the voice must belong to the President and not to Congress. The core of *Zivotofsky II*, ultimately, seems to be that "only the Executive has the characteristic of unity at all times."<sup>154</sup> This argument allows the executive to "take the decisive, unequivocal action necessary to recognize other states."<sup>155</sup> Decisiveness, in turn, allows foreign countries to develop stable expectations when dealing with the United States.<sup>156</sup> But if the reliance interests of American allies shifts the distribution of unmentioned powers toward the executive, then *Youngstown's* Category Three is hardly a presumption in favor of Congress.

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151. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

152. *Id.* at 401.

153. *Id.* at 424 (citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000)).

154. *Zivotofsky II*, 135 S. Ct. at 2086 (quoting *THE FEDERALIST* No. 70, *supra* note 28, at 424).

155. *Id.*

156. *See id.* ("Foreign countries need to know, before entering into diplomatic relations or commerce with the United States, whether their ambassadors will be received; whether their officials will be immune from suit in federal court; and whether they may initiate lawsuits here to vindicate their rights. These assurances cannot be equivocal.").

To take a stark example, President Nixon vetoed the WPR because limiting his unilateral authority to send troops abroad would diminish the confidence of allies. Under the WPR, American involvement in foreign conflict terminates after sixty days unless the President obtains specific legislative authorization.<sup>157</sup> President Nixon argued that the automatic deadline provision would undermine the confidence of our allies and embolden our enemies because “[u]ntil the Congress suspended the deadline, there would be at least a chance of United States withdrawal and an adversary would be tempted therefore to postpone serious negotiations until the sixty days were up.”<sup>158</sup> *Zivotofsky II* vindicates Nixon’s argument. If the President’s implied recognition power can displace federal law to protect diplomatic confidence, then the President’s *enumerated* Commander-in-Chief power should be beyond the restrictions of the WPR. This is particularly true when the President deems that compliance might “increas[e] the likelihood of miscalculation and war.”<sup>159</sup>

*Youngstown* did not view the allocation of power between the political branches as a function of what branch would use that power effectively.<sup>160</sup> Although *Zivotofsky II* does not support the proposition that a presidential power can displace federal legislation any time synchronicity or speed is important, it allows the executive branch’s structural advantages to be among the factors that the Court looks to when reviewing executive activity at the lowest ebb. In close calls like *Zivotofsky II*, that analytic approach helps the President because a unitary President will always outperform a plural legislature.<sup>161</sup>

### B. *Zivotofsky II* as Executive Branch Precedent

Even if federal courts read *Zivotofsky II* narrowly, executive branch lawyers will not. Executive branch lawyers work under different incentives and with different materials than federal judges.<sup>162</sup>

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157. 50 U.S.C. §§ 1541–1548 (2012).

158. Veto of the War Powers Resolution, 311 PUB. PAPERS 893, 894 (Oct. 24, 1973).

159. *Id.*

160. Indeed, Jackson warned against conflating “the issue of a power’s validity with the cause it is invoked to promote.” *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring).

161. See *Zivotofsky II*, 135 S. Ct. at 2123 (Scalia, J., dissenting) (predicting that the “[f]unctionalism of the sort the Court practices today will systematically favor the unitary President over the plural Congress”).

162. See Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1456, 1458 (2010) (“[A]s an office within the Executive Branch, OLC views the law through a particular lens . . . [That position] gives [OLC] a special reason to grant added weight to its precedents on issues of executive power.”).



The institutional norm of the Office of Legal Counsel (OLC) is to find reasonable legal grounds in support of the President, often resulting in broad pronouncements of executive power.<sup>163</sup> That inclination is not inappropriate, but simply an outworking of the Madisonian paradigm in which each branch of the federal government guards the metes and bounds of its authority against encroachments by the other two.<sup>164</sup> Administration lawyers are therefore careful not to concede ground to Congress when there is colorable basis to assert executive authority.

Attention to the context of OLC is critical because justiciability doctrines like Article III standing often prevent courts from addressing foreign affairs questions like the use of military force.<sup>165</sup> And even in the rare cases that properly present separation-of-powers questions, courts extend great deference to the executive and leave such issues to be resolved internally.<sup>166</sup> Additionally, OLC's memorialized opinions command a measure of *stare decisis*.<sup>167</sup> That matters because OLC has

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163. See, e.g., Memorandum of Law of the United States Department of Justice, as Amicus Curiae with respect to the Independent Counsel's Opposition to the Defendant's Motions to Dismiss or Limit Count One at 6, *United States v. North*, 708 F. Supp. 375 (D.D.C. 1988) (No. 88-0080-02) (defending Oliver North during the Iran-Contra prosecution).

164. See THE FEDERALIST NO. 51, at 320–21 (James Madison) (Clinton Rossiter ed., 1961) (arguing that “the preservation of liberty” requires that the branches of government should, “by their mutual relations, be the means of keeping each other in their proper places”); The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 126 (1996) (“Executive branch lawyers . . . have a constitutional obligation . . . to assert and maintain the legitimate powers and privileges of the President against inadvertent or intentional congressional intrusion.”).

165. Moss, *supra* note 19, at 1304 (observing that “standing, mootness, ripeness, or other rules of non-justiciability” often foreclose judicial review of Executive decisions to “commit troops overseas” or “assert executive privilege”).

166. See, e.g., *Arar v. Ashcroft*, 585 F.3d 559, 563, 565 (2d Cir. 2009) (en banc) (dismissing the suit of a man who alleged that he was falsely detained and tortured because “it is for the Executive in the first instance to decide how to implement extraordinary rendition, and for the elected members of Congress—and not for us as judges—to decide whether an individual may seek compensation”).

167. See Memorandum from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, Dep’t of Justice, to Attorneys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions 2 (July 16, 2010), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> [<https://perma.cc/A7CV-5TL7>] (“OLC opinions should consider and ordinarily give great weight to any relevant past opinions of Attorneys General and the Office. The Office should not lightly depart from such past decisions, particularly where they directly address and decide a point in question . . . .”); Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 516 (1993) (“OLC has adopted a rule suggesting that past precedent should be accorded a certain measure of *stare decisis* from administration to administration.”); Morrison, *supra* note 162, at 1496 (“OLC’s precedents can function for OLC like settled Executive Branch practice functioned for Justice Frankfurter in the *Steel Seizure* case: as a ‘gloss’ on constitutional provisions that are both textually spare and under-

also devoted extensive thought to matters of presidential power and national security.<sup>168</sup>

*Zivotofsky* IP's expansive reading of the executive diplomacy power can readily be applied to national security questions.<sup>169</sup> The Department of Justice (DOJ) has often argued that the President's power as Commander in Chief is interwoven with the executive's role as the nation's representative to other countries.<sup>170</sup> In 1898, acting Attorney General John K. Richards told President McKinley that he could lawfully prohibit the operation of French telegraph cables installed in Cape Cod without government approval.<sup>171</sup> Richards concluded that the President was empowered to intervene because the "preservation of our territorial integrity" and "relations with foreign powers" are "[e]ntrusted, in the first instance, to the President."<sup>172</sup> More recently, OLC defended the 2011 military intervention in Libya as a lawful exercise of President Obama's "authority to conduct the foreign relations."<sup>173</sup>

Yet, the executive branch did not claim power to violate a federal law in either of these examples. The Foreign Cables opinion expressly qualified President McKinley's power "to control the landing of

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addressed by judicial doctrine."); *see also id.* at 1464 ("OLC's legal advice is treated as binding within the Executive Branch until withdrawn or overruled.").

168. Walter Dellinger's opinion defending President Clinton's military intervention in Haiti is a good example. *See generally* Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173 (1994) [hereinafter Haiti Opinion] (laying out the legal justifications for the deployment of forces to Haiti). The Haiti Opinion drew criticism from members of the legal academy because Dellinger, while he was a professor at Duke Law School, had maintained that the Persian Gulf War required prior congressional approval. *See* Laurence Tribe, *Where Mr. Dellinger Stands and Where He Sits*, WASH. TIMES, Sept. 13, 1994, at A16 (accusing Dellinger of hypocrisy). In response, Mr. Dellinger argued that "unlike an academic lawyer . . . lawyers who are now at the Office of Legal Counsel . . . are expected to look to the previous opinions of the Attorneys General" to arrive at consistent decisions. Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. MIAMI L. REV. 107, 109–10 (1995).

169. As the Supreme Court explained in a different case involving presidential power over passports, "foreign policy and national security considerations cannot neatly be compartmentalized." *Haig v. Agee*, 453 U.S. 280, 307 (1981).

170. Placing of United States Armed Forces Under United Nations Operational or Tactical Control, 20 Op. O.L.C. 182, 183–86 (1996) (concluding that a bill prohibiting the President from committing U.S. troops to U.N.-commanded peacekeeping missions would "unconstitutionally constrain[] the President's exercise of his constitutional authority as Commander-in-Chief . . . [and] undermine[] the President's constitutional authority with respect to the conduct of diplomacy").

171. *Foreign Cables*, 22 Op. Att'y Gen. 13, 27 (1898).

172. *Id.* at 25–26.

173. Authority to Use Military Force in Libya, 35 Op. O.L.C., 2011 WL 1459998, at \*9–10 (2011).

foreign submarine cables” on the “absence of a legislative enactment.”<sup>174</sup> That is why *Zivotofsky II* will be a significant precedent in the executive branch. The Court not only resolved a question of presidential power at the lowest ebb by invoking values such as “unity,” the nation speaking with “one voice,” and the ability to act with “decision, activity, secrecy and dispatch”—it relied on such considerations to invalidate an act of Congress.<sup>175</sup>

*Zivotofsky II* also endorses the once-controversial practice of presidential signing statements.<sup>176</sup> Presidents use signing statements to lay down markers on provisions in a statute that they assert implicate an exclusive domain of the executive branch.<sup>177</sup> Signing statements signal flashpoints where the President is likely to challenge Congress. Presidents have asserted in signing statements the exclusive power to initiate covert operations,<sup>178</sup> collect electronic surveillance,<sup>179</sup> and dispose of captured enemy combatants.<sup>180</sup>

### III. *ZIVOTOFSKY II* AS WAR POWERS PRECEDENT

By enhancing the power of the Commander in Chief at the lowest ebb, *Zivotofsky II* emboldens the executive branch “to innovate and take risks” by ignoring legislation that interferes with national security objectives.<sup>181</sup> This Part presents three case studies: covert-action notification requirements, electronic surveillance, and treatment of captured enemy combatants. Each shows that *Zivotofsky II* may have

174. Foreign Cables, *supra* note 171, at 27.

175. *Zivotofsky II*, 135 S. Ct. 2076, 2084, 2086 (2015) (citations omitted).

176. See Jack Goldsmith, *Zivotofsky’s Vindication (and the New York Times’ Approval) of Signing Statements*, LAWFARE (June 9, 2015, 9:16 AM), <https://www.lawfareblog.com/zivotofskys-vindication-and-new-york-times-approval-signing-statements> [http://perma.cc/7Q95-ZKCM] (noting that editors of the *New York Times* had a negative view of the Bush administration’s practice of issuing signing statements).

177. See Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 317–18 (2006) (cataloging the instances President Bush used signing statements to “raise[] constitutional concerns” about intrusion on executive power).

178. Statement on Signing the Intelligence Authorization Act, Fiscal Year 1991, 27 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 1137, 1137–38 (Aug. 14, 1991).

179. Statement on Signing the Intelligence Reform and Terrorism Prevention Act of 2004, 40 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 2993, 2993–94 (Dec. 17, 2004).

180. Press Release, The White House, Statement by the President on H.R. 3304 (Dec. 26, 2013), <https://www.whitehouse.gov/the-press-office/2013/12/26/statement-president-hr-3304> [http://perma.cc/A7YJ-7MTX].

181. See JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* 186 (2006) (“In the war on terrorism, we will need officials at all levels, from career civil servants to cabinet members, to innovate and take risks.”).

concrete implications for executive power. Presidents have previously pushed the envelope in all of these areas before *Zivotofsky II*,<sup>182</sup> often in secret<sup>183</sup> and without convincing legal authority to support the actions.<sup>184</sup>

### A. Covert-Operation Notice Requirements

1. *The Legal Framework.* In November of 1986, the Beirut news magazine *Al-Shiraa* revealed that the Reagan administration had secretly (and probably illegally) sold arms to Iran through backchannels in Israel.<sup>185</sup> Attorney General Edwin Meese announced that the weapons sale was part of an effort to obtain the release of American hostages held in Lebanon and that proceeds had been given to revolutionary Contras in communist Nicaragua.<sup>186</sup> CIA General Counsel Stanley Sporkin assured the public that the administration had not acted unlawfully because the arms-for-hostages exchange fell within the President's exclusive Commander-in-Chief prerogative to authorize covert actions.<sup>187</sup>

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182. For further discussion, see *supra* note 170; *infra* notes 185–87, 202–05 and accompanying text.

183. For further discussion, see, e.g., *supra* note 169 and accompanying text; *infra* notes 186, 220–21.

184. See, e.g., Ronald Dworkin, Kathleen M. Sullivan, Laurence H. Tribe, David Cole & Curtis Bradley, *On NSA Spying: A Letter to Congress*, 53 N.Y. REV. BOOKS (Feb. 9, 2006), <http://www.nybooks.com/articles/2006/02/09/on-nsa-spying-a-letter-to-congress> [<http://perma.cc/6595-D4NA>] (concluding that the DOJ failed to present any plausible legal grounds for certain surveillance actions during the Bush administration).

185. RICHARD S. CONLEY, HISTORICAL DICTIONARY OF THE U.S. PRESIDENCY, at xl (2015).

186. *Iran-Contra Investigation* (C-SPAN television broadcast Nov. 25, 1986); see also JOHN TOWER, EDMUND MUSKIE & BRENT SCOWCROFT, TOWER COMMISSION REPORT 1 (1987) (discussing how the affair raised “questions not only of policy and propriety but also violations of law”). During the period at issue, direct military aid to the Contras likely violated the Boland Amendment. See *United States v. North*, 708 F. Supp. 375, 377 n.1 (D.D.C. 1988) (assessing the scope of the Boland Amendment). Iran-Contra may have also violated the Arms Export Control Act (AECA), 22 U.S.C. §§ 2751–2780 (2006). The AECA generally required that “[n]o defense article or defense service,” shall be exported to a foreign country that “has repeatedly provided support for acts of international terrorism.” *Id.* §§ 2753, 2780(d). But see David J. Scheffer, *U.S. Law and the Iran-Contra Affair*, 81 AM. J. INT’L L. 696, 698–713 (1987) (cataloging the exceptions to the AECA).

187. Sporkin claimed Congress had in fact recognized this constitutional authority in section 501 of the 1980 Intelligence Oversight Act, which only applied “to the extent consistent with . . . the Constitution,” Pub. L. No. 96-450, 94 Stat. 1975 (codified at 50 U.S.C. § 413(a) (1982)). See *Joint Hearings Before the H. Select Comm. to Investigate Covert Arms Transactions with Iran and the S. Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition*, 100th Cong. 194 (1987) (statement of Stanley Sporkin, Gen. Counsel, Central Intelligence Agency) (submitting that “section 501 specifically recognizes that . . . there are constitutional prerogatives

Congress rejected Sporkin's argument. In 1991, the National Security Act was amended by placing additional restrictions on covert operations.<sup>188</sup> The amendments also provided, for the first time,<sup>189</sup> a legal definition of covert action: "an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly."<sup>190</sup> Covert actions are politically satisfying because they "provide an intermediate option between the shortcomings of diplomacy and the excesses of military action."<sup>191</sup> But that convenience means that covert missions are susceptible to impulsive decisionmaking. These amendments passed in the wake of Iran-Contra affair endeavor to prevent covert-action misuse.

2. *How Zivotofsky II Weakens Covert-Action Limitations.* *Zivotofsky II* strengthens two arguments for exclusive presidential authority over covert actions and, therefore, increases the chance that the executive branch will resort to unilateral action in the future. First, the *Zivotofsky II* Court clearly viewed the ability to act secretly as an attribute of presidential power that is necessary to meet constitutional

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which are not going to be dealt with by the notification" required by the Intelligence Oversight Act). Some of the drafters of section 501 appear to have agreed with this interpretation. See 126 CONG. REC. 13,127 (June 3, 1980) (statement of Sen. Sam Nunn) ("[I]n certain instances the requirements of secrecy preclude any prior consultation with Congress."); see also *id.* at 13,125 (statement of Sen. Walter Huddleston) ("Section 501(b) recognizes that the President may assert constitutional authority to withhold prior notice of covert operations . . .").

188. See Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, § 503, 105 Stat. 429, 442 (codified as amended at 50 U.S.C. § 3093 (2012)) (setting out limits on when the President may authorize covert actions, including five conditions that must be found in order to determine that the action is necessary). The new legal regime prohibits the President from authorizing a covert action unless a written finding was submitted to the Gang of Eight. See *id.* § 3093(c)(2) (referring to the "chairmen and ranking minority members of the congressional intelligence committees."). A written finding cannot retroactively authorize a covert action. *Id.* § 3093(a)(2). The finding must specify "each department, agency, or entity of the United States" involved in the mission, including whether "any third party . . . will be used . . . in any significant way." *Id.* §§ 3093(a)(3)–(4). The President also cannot authorize a mission that would violate the Constitution or federal law. *Id.* § 3093(a)(5). Nor can a covert action "be conducted which is intended to influence United States political processes, public opinion, policies, or media." *Id.* § 3093(f).

189. MARSHALL CURTIS ERWIN, CONG. RESEARCH SERV., RL33715, COVERT ACTION: LEGISLATIVE BACKGROUND AND POSSIBLE POLICY QUESTIONS 1 (2013).

190. 50 U.S.C. § 3093(e).

191. William S. Cohen, *Congressional Oversight of Covert Actions: The Public's Stake in the Forty-Eight Hour Rule*, 12 HARV. J.L. & PUB. POL'Y 285, 293 (1989).

responsibilities.<sup>192</sup> Recognition determinations are generally not urgent or necessary to protect the lives of Americans in danger. And yet *Zivotofsky II* decided that recognition needed to be an exclusive executive power, in part because only the President can collect “delicate and often secret” information and respond with “decisive, unequivocal action.”<sup>193</sup> Those pragmatic arguments have equal (if not greater) force in the covert-mission context where the President orders armed service members into danger on the basis of classified intelligence, sometimes on short notice, and often to protect other American lives.<sup>194</sup> There is also the possibility that congressional notification jeopardizes operational safety. As Charles Cooper, Assistant Attorney General in the Reagan administration, testified before the Senate in 1988, occasions arise when the President reaches the conclusion that adding more persons “into the charmed circle” is an unacceptable risk.<sup>195</sup> In that case, secrecy is a tactical, battlefield decision that cannot constitutionally be limited by a notification statute (or so the argument goes).<sup>196</sup> *Zivotofsky II* buttresses that contention.

Second, the President may determine that mandatory disclosure will have a chilling effect “on the willingness of other countries to cooperate with the United States.”<sup>197</sup> President Reagan’s Secretary of Defense Frank Carlucci, for example, believed that mandatory congressional notification would jeopardize the collection of

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192. See *Zivotofsky II*, 135 S. Ct. 2076, 2086 (2015) (“[O]nly the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, ‘[d]ecision, activity, secrecy, and dispatch.’” (quoting THE FEDERALIST NO. 70, *supra* note 28, at 424 (alteration in original))); cf. Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Actions, 13 Op. O.L.C. 258, 259 (1989) [hereinafter, CIA Covert Actions Opinion] (“[T]he President must be able to act secretly in order to meet his constitutional responsibilities in foreign affairs.”).

193. *Zivotofsky II*, 135 S. Ct. at 2086.

194. See, e.g., Nicholas Schmidle, *Getting Bin Laden: What Happened that Night in Abbottabad*, NEW YORKER (Aug. 8, 2011), <http://www.newyorker.com/magazine/2011/08/08/getting-bin-laden> [<http://perma.cc/THY2-XC76>] (describing the covert Bin Laden raid).

195. *Oversight Legislation: Hearings Before the S. Select Comm. on Intelligence*, 100th Cong. 161 (1988) (statement of Charles Cooper, Assistant Att’y Gen. of the United States) [hereinafter *Oversight Legislation Hearings*].

196. For example, the DOJ has argued that Congress may not use its spending power to require that the President notify Congress of all covert missions that draw from the Reserve for Contingencies fund. See CIA Covert Actions Opinion, *supra* note 192, at 261 (1989) (characterizing a statute requiring prior congressional notification of certain covert actions as tantamount to Congress using its spending power to take “tactical control of the armed forces”).

197. See Cohen, *supra* note 191, at 299 (noting that chilling effect is a “major executive branch concern,” though finding that any chilling effect caused by oversight is negligible and, in the long run, worth the risks).

intelligence.<sup>198</sup> If our intelligence partners worldwide “perceive that the CIA has no control over the information” because “the agency is obliged to disgorge” its intelligence to Congress, he warned, “our intelligence assets will dry up.”<sup>199</sup>

*Zivotofsky II* relies on a similar argument. Recognition, the Court reasoned, must be an exclusive presidential power because “[f]oreign countries need to know, before entering into diplomatic relations or commerce with the United States” that “their ambassadors will be received” and that “their officials will be immune from suit in federal court.”<sup>200</sup> “These assurances cannot be equivocal.”<sup>201</sup> Intelligence gathering requires similar assurances. Suppose the President decided to authorize covert military action dependent on sensitive information provided by a foreign country on the condition that the President would not disclose the covert operation to Congress. Although such an action would violate section 503 of the Intelligence Oversight Act, a court reviewing that action after the fact would probably be reluctant to find that the President acted unlawfully. Citing *Zivotofsky II*, executive branch lawyers would introduce historical-gloss and functionalist arguments as a basis to disregard covert-action disclosure requirements in the unique setting where lives, ally assurances, and operational success demand “secrecy” and “dispatch.”

## B. *Electronic-Surveillance Limitations*

1. *The Legal Framework.* In December 2005, the *New York Times* revealed that the Bush administration had issued a classified executive order authorizing the National Security Agency (NSA) to conduct warrantless electronic surveillance within the United States.<sup>202</sup> Electronic surveillance is the interception of “the *contents* of any wire or radio communication” sent or received by a person “who is in the United States.”<sup>203</sup> In a press briefing two days after the news broke,

198. *Oversight Legislation Hearings*, *supra* note 195, at 198–99, 217–18 (statement of Frank Carlucci, Secretary of Defense of the United States).

199. *Id.* at 198–99. Secretary Carlucci added that intelligence assets had expressed reluctance to share sensitive information because “you people in the U.S. Government cannot keep a secret.” *Id.* at 217.

200. *Zivotofsky II*, 135 S. Ct. 2076, 2086 (2015).

201. *Id.*

202. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1, A22 (citing an anonymous tip from “current and former officials” who were “concern[ed] about the operation’s legality and oversight”).

203. 50 U.S.C. § 1801(f)(1) (2012) (emphasis added).

Attorney General Gonzales confirmed the secret order, but he explained that it only authorized the NSA to intercept “contents of communications” where the federal government has “a reasonable basis to conclude that one party to the communication is a member of al Qaeda.”<sup>204</sup>

The DOJ defended this order by publishing a full-throated defense of the President’s independent authority to direct intelligence gathering in connection with hostilities against al Qaeda.<sup>205</sup> But the DOJ’s white paper conceded that the President had authorized the NSA to conduct “warrantless electronic surveillance . . . at home” in the United States.<sup>206</sup> And because the Foreign Intelligence Surveillance Act (FISA) requires the government to obtain a warrant before spying on Americans’ emails and phone calls,<sup>207</sup> President Bush’s order was lawful only if his authority over wartime electronic surveillance was not only independent, but also exclusive.

FISA generally requires the government to obtain a warrant from the Foreign Intelligence Surveillance Court (FISC) before monitoring the electronic communications of a person within the United States.<sup>208</sup> FISA contains three limited exceptions,<sup>209</sup> but the only exception relevant to President Bush’s surveillance order was a provision

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204. Press Release, The White House, Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), <http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/print/20051219-1.html> [<https://perma.cc/4XKT-SU7J>] (describing the legal authorities supporting the President’s decision).

205. U.S. Dep’t of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (Jan. 19, 2006) [hereinafter FISA Opinion].

206. *Id.* at 2.

207. See Foreign Intelligence Surveillance Act of 1978 § 102, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. § 1802(a)(1)(B) (2012)) (allowing the President to conduct warrantless surveillance where “there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party”).

208. See 50 U.S.C. § 1803 (designating federal judges to hear applications to authorize surveillance within the United States).

209. See *id.* § 1802(a)(1) (allowing the Attorney General to authorize warrantless electronic surveillance “for periods of up to one year if the Attorney General certifies in writing under oath that” the surveillance is directed at communications “used exclusively” between foreign powers or on “property or premises under the open and exclusive control of a foreign power”); *id.* § 1805(e) (allowing the Attorney General to bypass warrant procedure if there are reasonable grounds that “an emergency situation exists” and a “factual basis for the issuance of an order” under FISA exists, and if a FISC judge is immediately notified afterwards); *id.* § 1811 (authorizing the President to “authorize electronic surveillance without a court order . . . for a period not to exceed fifteen calendar days following a declaration of war by the Congress”).



authorizing the President to order warrantless electronic surveillance for fifteen days during a war formally declared by Congress.<sup>210</sup>

The DOJ argued<sup>211</sup> that the declared-war exception was met by the 2001 Authorization for Use of Military Force (2001 AUMF).<sup>212</sup> Congress passed the 2001 AUMF seven days after the September 11 attacks to authorize President Bush to deploy military forces abroad.<sup>213</sup> The DOJ interpreted the 2001 AUMF as implicitly granting the President authority to monitor, without a warrant, the content of email and phone conversations of persons within the United States for over two years.<sup>214</sup> That reading is difficult to reconcile with provisions in FISA that make the President's authority to order warrantless surveillance incumbent on a declaration of war from Congress,<sup>215</sup> which is a more formal authorization than the 2001 AUMF. And even then, the President's authority is limited to the first fifteen days of hostilities.<sup>216</sup>

The DOJ also cited *In re Sealed Case*<sup>217</sup> to suggest that the President has exclusive authority to conduct warrantless electronic surveillance during wartime.<sup>218</sup> That case, the first appeal from FISC to the FISA "Court of Review,"<sup>219</sup> addressed whether FISC could require that the intelligence obtained by its approval order not be used for criminal prosecutions.<sup>220</sup> The review court concluded that such conditions were not mandated by either the plain text of FISA or the Constitution.<sup>221</sup> The court also acknowledged that other federal courts generally had found that the President possessed "inherent" authority

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210. *Id.* § 1811.

211. FISA Opinion, *supra* note 205, at 25–26.

212. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

213. *Id.* § 2(a).

214. FISA Opinion, *supra* note 205, at 2–3.

215. 50 U.S.C. § 1811.

216. *Id.*; *see also* Dworkin et al., *supra* note 184 (reasoning that "the AUMF cannot reasonably be construed to implicitly authorize warrantless electronic surveillance in the United States during wartime, where Congress has expressly and specifically addressed that precise question in FISA and limited any such warrantless surveillance to the first fifteen days of war").

217. *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002).

218. FISA Opinion, *supra* note 205, at 31.

219. *Sealed Case*, 310 F.3d at 719; *see also* 50 U.S.C. § 1803(b) (2012) (establishing appellate review of FISC decisions).

220. *See Sealed Case*, 310 F.3d at 720–22 (characterizing the FISA order as constructing a "wall" between "intelligence officials and law enforcement officers").

221. *Id.* at 720.

to order warrantless intelligence gathering.<sup>222</sup> But these decisions characterized presidential authority as independent, not exclusive; and in any event were issued before FISA was enacted.<sup>223</sup> Indeed, *Sealed Case* itself expressly determined that FISA's statutory restrictions on electronic surveillance were proper limits on presidential power.<sup>224</sup>

2. *How Zivotofsky II Affects the Law of Surveillance.* The DOJ's white paper also emphasized the executive branch's "structural advantages" to support its broad reading of the 2001 AUMF.<sup>225</sup> In particular, the DOJ argued that the President's inherent authority to conduct intelligence gathering could not be subject to certain statutory restrictions because only the executive has the requisite "expertise,"<sup>226</sup> largely facilitated by "his confidential sources . . . in the form of diplomatic, consular and other officials."<sup>227</sup> Such arguments are strengthened by *Zivotofsky II*. Like the recognition power, foreign-intelligence collection does not clearly fall within the text of the President's responsibilities enumerated in Article II,<sup>228</sup> nor within any

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222. *Id.* at 742 (noting that other courts have uniformly decided "that the President d[oes] have inherent authority to conduct warrantless searches to obtain foreign intelligence information").

223. *Id.* (explaining that all "courts to have decided the issue" "dealt with a pre-FISA surveillance"); see also ELIZABETH B. BAZAN & JENNIFER K. ELSEA, CONG. RESEARCH SERV., MEMORANDUM: PRESIDENTIAL AUTHORITY TO CONDUCT WARRANTLESS ELECTRONIC SURVEILLANCE TO GATHER FOREIGN INTELLIGENCE INFORMATION 31 (Jan. 5, 2006) (concluding that the precedent *Sealed Case* references for the President's authority over intelligence "appears to have been . . . cases which pre-date FISA's passage or which address pre-FISA surveillances").

224. *Sealed Case*, 310 F.3d at 742.

225. FISA Opinion, *supra* note 205, at 7.

226. *Id.* at 9.

227. *Id.* at 7 (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

228. The extent to which the Commander-in-Chief Clause contains an exclusive power over intelligence collection is debated. Compare David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb: A Constitutional History*, 121 HARV. L. REV. 941, 951, 1059, 1075 (2008) (contending that "constitutional practice between 1789 and the Civil War suggests" the Commander in Chief's role in intelligence collection is "ultimate[ly] subject[t] to statutory control"), with John Yoo, *The Legality of the National Security Agency's Bulk Data Surveillance Programs*, 37 HARV. J.L. & PUB. POL'Y 901, 903 (2014) (arguing that the Commander-in-Chief power necessarily includes "the ability to engage in electronic surveillance that gathers intelligence on the enemy"). Some have argued that Article II's Vesting Clause contains an unenumerated, residual foreign affairs power that includes the power to dispatch spies overseas. See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 288 (2001) ("[W]hen James Iredell spoke of the President sending a spy overseas, he assumed that the executive's power over foreign affairs would authorize the executive's control of such agents." (footnote omitted)).

of Congress's powers enumerated in Article I.<sup>229</sup> Historical sources indicate that the Framers understood intelligence gathering as an independent prerogative of the Commander in Chief, subject to congressional control through the spending power.<sup>230</sup> That textual ambiguity makes warrantless wiretapping an especially rich example of how the functionalist approach in *Zivotofsky II* can enhance executive powers.

*Zivotofsky II* means that administration lawyers no longer need to rely on “shards of judicial dicta” to argue that the comparative advantages of the presidency inform the reach of executive powers.<sup>231</sup> *Zivotofsky II* asserts the functionalist arguments that the DOJ raised in defense of President Bush's warrantless wiretapping program. And where the DOJ heavily cited *Curtiss-Wright*, they can now cite *Zivotofsky II* for a case that, unlike *Curtiss-Wright*, actually invalidated an act of Congress.

### C. *Extraordinary Rendition and the Exchange of Prisoners*

1. *The Legal Framework.* Rendition is the “return of a fugitive from one state to the state where the fugitive is accused or was convicted of a crime.”<sup>232</sup> Extraordinary rendition is the extrajudicial transfer of an individual “for the purpose of arrest, detention, [or]

229. The Commerce Clause is the most likely candidate for an enumerated congressional power to regulate electronic surveillance. See U.S. CONST. art. 1, § 8, cl. 3; Gary Lawson, *What Lurks Beneath: NSA Surveillance and Executive Power*, 88 B.U. L. REV. 375, 392 n.112 (2008) (“Modern doctrine . . . would find authorization for FISA in the Commerce Clause.”); see also Victor M. Hansen & Lawrence Friedman, *The Value of the Military Commissions Act as Nonjudicial Precedent in the Context of Litigation over National Security Policymaking*, 53 S. TEX. L. REV. 1, 20 (2011) (describing “domestic surveillance for foreign intelligence purposes” as “an area of overlap between the executive and legislative branches”).

230. Compare 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 113 (John Elliot ed., William S. Hein & Co. 2d ed. 1996) (1891) (statement of James Iredell) (observing that the Constitution enabled the President to order a spy to “go over to the enemy” to obtain “secret information”), with Act of 1 July 1790, 1 Stat. 128–129 (1790) (requiring President Washington to provide an accounting of intelligence expenditures). The President's independent power over matters of espionage accords with practice during the War for Independence. The Committee of Secret Correspondence gathered intelligence for the Continental Congress, see 3 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 392 (1905), while General Washington primarily relied on his own spies, see ALEXANDER ROSE, WASHINGTON'S SPIES: THE STORY OF AMERICA'S FIRST SPY RING 67–75 (2006).

231. Goldsmith, *supra* note 25, at 114.

232. *Rendition*, BLACK'S LAW DICTIONARY (10th ed. 2014).

interrogation by the receiving State.”<sup>233</sup> President Clinton was the first to use rendition principles as part of an offensive against international terrorism. Presidential Decision Directive 39, signed on June 21, 1995, vested in the Secretary of State pertinent authority to “use all legal means available to exclude from the United States persons who pose a terrorist threat and deport or otherwise remove from the United States any such aliens.”<sup>234</sup> Some question whether President Clinton had the constitutional authority to uproot individuals suspected of terrorism and deliver them to foreign countries “where they were wanted for their crimes.”<sup>235</sup> During a candid meeting with President Clinton, Vice President Al Gore admitted that extraordinary rendition is “[o]f course . . . a violation of international law, that’s why it’s a covert action. The guy is a terrorist. Go grab his ass.”<sup>236</sup>

Extraordinary rendition multiplied after the attacks of September 11. In a confidential opinion, OLC gave the CIA the go-ahead to transfer Iraqi citizens and other detainees out of Iraq to be interrogated for a “brief but not indefinite period.”<sup>237</sup> By 2004, reports began to surface that the CIA had created a phony corporation—assigned the Orwellian name “Premier Executive Transport Services”—for the purpose of “whisk[ing]” away hooded and handcuffed prisoners to countries that do not mind performing the “dirty work” of enhanced interrogations.<sup>238</sup>

After the CIA’s extraordinary rendition policy became public, Attorney General Alberto Gonzales assured the public that if renditions were made to countries with a history of torture, the Bush

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233. MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32890, *RENDITIONS: CONSTRAINTS IMPOSED BY LAWS ON TORTURE* 1 (2009).

234. Presidential Decision Directive 39: U.S. Policy on Counterterrorism (June 21, 1995), <http://fas.org/irp/offdocs/pdd39.htm> [<https://perma.cc/R4NS-HA7A>].

235. See Louis Fisher, *Extraordinary Rendition: The Price of Secrecy*, 57 AM. U. L. REV. 1405, 1409 (2008) (“[S]ome of the two dozen suspects were brought to the United States to stand trial, but ‘most were delivered to other countries where they were wanted for their crimes.’ Does ‘wanted for crimes’ mean being turned over to the judicial system, or, instead, for interrogation and torture?”).

236. RICHARD CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA’S WAR ON TERROR* 143–44 (2004).

237. Dana Priest, *Memo Lets CIA Take Detainees out of Iraq*, WASH. POST, Oct. 24, 2004, at A1.

238. See Dana Priest, *Jet Is an Open Secret in Terror War*, WASH. POST, Dec. 27, 2004, at A1 (reporting on the actions of the CIA and the “Premier Executive Transport Services”). Egyptian interrogators were known to beat victims “with fists, whips, metal rods, or other objects,” subject them “to electrical shocks,” and douse them with cold water. 2 DEP’T OF STATE, *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2003*, at 1826–27 (2004).

administration would obtain “assurances” that torture would not be used.<sup>239</sup> Put delicately, these assurances were aspirational, since the administration “can’t fully control what other nations do.”<sup>240</sup> Put indelicately, as one CIA officer who helped orchestrate renditions stated, such assurances were a “farce.”<sup>241</sup>

Extraordinary rendition was undertaken without authorization from Congress and arguably in violation of several restrictions that Congress has placed on the President’s authority. One source of legal restrictions was the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>242</sup> (Torture Convention), approved by the Senate in 1994.<sup>243</sup> To be sure, most provisions of the Torture Convention are not self-executing,<sup>244</sup> and so it cannot be invoked in court by persons subject to extradition orders.<sup>245</sup> But Congress has passed implementing legislation. For example, 18 U.S.C. § 2340A criminalizes actions—and more importantly conspiracies—by public officials to sanction acts of torture outside of the United States when acting under the color of law.<sup>246</sup> Congress has also implemented the Torture Convention by declaring (as a matter of policy) that the United States will not “effect the involuntary return” of any person to a country where there are substantial grounds to believe that they will be tortured, “regardless of whether the person is physically present in the United States.”<sup>247</sup>

239. R. Jeffrey Smith, *Gonzales Defends Transfer of Detainees*, WASH. POST, Mar. 8, 2005, at A3.

240. *Id.* (citations omitted).

241. Dana Priest, *CIA Assurances on Transferred Suspects Doubted*, WASH. POST, Mar. 17, 2005, at A1.

242. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 [hereinafter Torture Convention].

243. See 136 CONG. REC. 36,198–99 (1990) (giving consent, subject to certain reservations, to the Torture Convention).

244. See S. EXEC. REP. NO. 30-101 (1990) (declaring “Articles 1 through 16 of the [Torture] Convention are not self-executing”). Absent this declaration, some argue that Article 3 of the Convention, prohibiting parties from extraditing individuals to countries where they will be tortured, would provide an enforceable cause of action. See Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 706–07, n.55 (1995) (arguing that Article 3 of the Torture Convention would “undoubtedly be enforceable by courts entertaining habeas corpus petitions of persons subject to extradition orders”).

245. See, e.g., *Pierre v. Gonzales*, 502 F.3d 109, 114 (2d Cir. 2007) (“The [Torture Convention] is not self-executing; by its own force, it confers no judicially enforceable right on individuals.”).

246. See H.R. REP. NO. 103-482, at 229 (1994) (Conf. Rep.) (noting that 18 U.S.C. §§ 2340, 2340A (2012) implement the Torture Convention).

247. 18 U.S.C § 2340A(a)–(c) (2012); see also *id.* § 2340 (defining “torture”).

Finally, though enacted after OLC's opinion greenlighting extraordinary rendition, the 2006 Military Commissions Act also establishes that the torture (or conspiracy to commit torture) of unlawful enemy combatants is a federal war crime.<sup>248</sup> Accordingly, the Congressional Research Service and other commentators believe that using extraordinary rendition to obtain intelligence through torture is illegal.<sup>249</sup> To be sure, prosecuting military officers or intelligence officials for violating these laws would be difficult, if not impossible in some cases. But Congress does not need to impose criminal liability to bring the President's power to the lowest ebb; it is sufficient if the President's action contravenes "the implied will of Congress."<sup>250</sup>

2. *The Significance of Zivotofsky II for Extraordinary Rendition Law.* President Bush's independent authority to order renditions of captured enemy combatants has been defended as a substantive component of the Commander-in-Chief power. The leading advocate of this position, Professor John Yoo, contends that "the President and military commanders historically have transferred captured enemy combatants to allies."<sup>251</sup> Historical practice tends to support an executive power over captured enemies. And as with recognition, Congress's authority to dictate the treatment of prisoners captured on the field of battle is uncertain.<sup>252</sup> That ambiguous constitutional

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248. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681, 2681-822 (codified at 8 U.S.C. § 1231).

249. *Id.* § 2241(d)(1)(A). President Bush noted in a signing statement that the CIA would "continue its program for questioning key terrorist leaders and operatives." *Remarks on Signing the Military Commissions Act of 2006*, 42 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 1832 (Oct. 17, 2006).

250. *See, e.g.,* GARCIA, *supra* note 233, at 12 ("Clearly, it would violate U.S. criminal law and [Torture Convention] obligations for a U.S. official to conspire to commit torture via rendition, regardless of where such renditions would occur."); Fisher, *supra* note 235, at 1416 (arguing that extraordinary rendition falls outside rule of law norms).

251. John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1235 (2004); *see also id.* at 1204-21 (collecting examples).

252. The main candidate for congressional authority is the Captures Clause, which grants to Congress the power to "make Rules concerning Captures on Land and Water." U.S. CONST. art. 1, § 8, cl. 11. But this clause has always been understood as referring only to captured enemy property. The word "Capture" bore a specific connotation in international law as "[t]he taking of property by one belligerent from another or from an offending neutral." *Capture*, 1 BOUVIER'S LAW DICTIONARY 422 (Francis Rawle ed., 3d rev. ed. 1914) (1839). And the Framers certainly understood that meaning because the precursor to the Captures Clause in the Articles of Confederation empowered the Continental Congress to "establish[] rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States, shall be divided or appropriated." ARTICLES OF CONFEDERATION OF 1781, art. IX, § 1. This reading is buttressed by Justice Story's well-regarded

footing, along with the President's historic authority over captured enemies, makes the topic of extraordinary rendition ripe for the analytic approach of *Zivotofsky II*.

*Zivotofsky II* will enhance executive branch assertions of an exclusive power to make decisions regarding torture and the treatment of captured enemy combatants in three ways. First, the President is more capable than a plural Congress "to take the decisive, unequivocal action necessary"<sup>253</sup> to make decisions regarding captured enemy combatants because their treatment has reciprocal implications for the treatment of American soldiers.<sup>254</sup> Second, the President's undisputed intelligence advantage means that the executive branch alone should negotiate agreements with foreign actors to interrogate high-value suspects.<sup>255</sup> Third, foreign countries will need unequivocal assurances from the President that America has the resolve to extract the information by torture before they relinquish high-value suspects. Those assurances require the President to have the option of rendering the prisoner to less squeamish partners in the War on Terror.

Indeed, the arguments in *Zivotofsky II* are strikingly similar to those proffered by the torture memos.<sup>256</sup> These memos, authored by Yoo while at OLC, infamously argued that battlefield interrogation standards were a core function of the Commander-in-Chief power because they serve vital military objectives, such as obtaining intelligence.<sup>257</sup> He further argued that the President's control over interrogation standards was not only inherent, but also exclusive because of "the functional consideration that national security

treatise on the Constitution, in which he explains that the Captures Clause empowers Congress only to "authorize the seizure and condemnation of the property of the enemy within, or without the territory of the United States." STORY, *supra* note 121, § 1172, at 64.

253. *Zivotofsky II*, 135 S. Ct. 2076, 2079 (2015).

254. See Yoo, *supra* note 251, at 1220–21 (explaining that America's treatment of captured members of the North Vietnamese Army "strictly adhered" to the Geneva Convention so as to ensure captured servicemen would be similarly treated).

255. See *id.* at 1200 (arguing that the "disposition of individuals captured during military operations requires command-type decisions" and requires "the gathering of intelligence," which is "the essence of executive action").

256. DUKE U. SCH. OF L., *Ilya Shapiro & Ernest A. Young: Supreme Court Roundup*, YOUTUBE (Oct. 21, 2015), <https://www.youtube.com/watch?v=Zww5dPLxzMA> [<https://perma.cc/V2XM-S2DE>] (suggesting that *Zivotofsky II* makes "the same argument" that "John Yoo infamously adopted in the Torture Memos during the Bush Administration").

257. Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def., Military Interrogation of Alien Unlawful Combatants Held Outside the United States 10 (Mar. 14, 2003), [https://www.aclu.org/files/pdfs/safefree/yoo\\_army\\_torture\\_memo.pdf](https://www.aclu.org/files/pdfs/safefree/yoo_army_torture_memo.pdf) [<https://perma.cc/X3E5-JBBL>].

decisions require a unity in purpose and energy that characterizes the Presidency alone.”<sup>258</sup> Yoo concluded that Congress can no more intrude on the President’s decision regarding the interrogation of enemy combatants than it could dictate tactical decisions on the ground.<sup>259</sup> That analysis, now adopted by an opinion of the Supreme Court, could embolden the executive to bend—if not break—federal statutes.

The Bergdahl prisoner exchange in 2014 is a useful example. Sergeant Bowe Bergdahl was captured by the Taliban in 2009 and was released in May 2014 in exchange for the release of five high-ranking members of the Taliban government from the Guantanamo Bay detention center.<sup>260</sup> The Obama administration executed the prisoner swap without notifying Congress.<sup>261</sup> After news of the exchange became public, the Government Accountability Office (GAO) concluded that the Bergdahl exchange violated section 1035 of the 2014 National Defense Authorization Act (2014 NDAA) and section 8111 of the 2014 Department of Defense Appropriations Act.<sup>262</sup>

*Zivotofsky II* casts doubt on the GAO’s assessment. Indeed, when President Obama signed the 2014 NDAA, he stated that section 1035 was an unconstitutional violation of “separation of powers principles” because it hampered the executive’s ability to “act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers.”<sup>263</sup> Whether the President had the authority to transfer five Taliban operatives out of Guantanamo in exchange for Bergdahl remains uncertain. But it is in such cases—the close calls—where *Zivotofsky II* is most helpful to the executive branch, because

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258. *Id.* at 5.

259. *Id.* at 19.

260. Michael Ames, *Untangling the Mysteries Behind Bowe Bergdahl’s Rescue Mission*, NEWSWEEK (Apr. 9, 2015, 5:56 AM), <http://www.newsweek.com/2015/04/17/untangling-mysteries-behind-bowe-bergdahls-rescue-mission-320891.html> [<http://perma.cc/XD2W-APXN>].

261. See Mitch McConnell, Republican Leader, United States Senate, B-326013, 2014 WL 4100408 (Comp. Gen. Aug. 21, 2014), <http://www.gao.gov/assets/670/665390.pdf> [<http://perma.cc/H4NU-TK8P>] (concluding that the Department of Defense violated the Department of Defense Appropriations Act, 2014 when it transferred several Guantanamo Bay detainees without “notify[ing] the relevant congressional committees at least 30 days in advance of the transfer”).

262. *Id.* at 7.

263. Press Release, The White House, Statement by the President on H.R. 3304 (Dec. 26, 2013), <https://www.whitehouse.gov/the-press-office/2013/12/26/statement-president-hr-3304> [<http://perma.cc/A7YJ-7MTX>].



functionalist considerations are now an additional justification for construing a traditional presidential power as an exclusive one.

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*Zivotofsky II* is readily adaptable to recurrent flashpoints between the executive and legislative branches in matters of national security. Administration lawyers, who already have a predilection to interpret presidential power expansively, will cite *Zivotofsky II* for the proposition that functionalist arguments inform the reach of presidential power at the lowest ebb. For instance, the executive branch can now cite *Zivotofsky II* to support the proposition that covert-operation notification laws unconstitutionally intrude on the Commander-in-Chief power when the President determines that nondisclosure is key to operational success. The decision's emphasis on executive branch intelligence gathering also appears to weaken FISA's prohibition on warrantless wiretapping. And because the decision deploys the same functionalist arguments used in the torture memos, laws designed to prevent the President from outsourcing the torture of unlawful enemy combatants are on uncertain footing. In short, federal statutes that restrain the unilateral use of presidential war powers are now more susceptible to disregard.

#### IV. OBJECTIONS

##### A. *An Inexplicable Outlier*

To some, *Zivotofsky II* may simply be a one-day-ticket decision.<sup>264</sup> Cognizant that the status of Jerusalem is a "delicate subject," perhaps the Court was simply loathe to force the President to reverse a decades-long policy of neutrality.<sup>265</sup> Under this view, *Zivotofsky II* is an outlier that does not signal a shift in doctrine.

That position is too optimistic. Collapsing *Zivotofsky II* into a results-driven one-off fails to explain the opinion's breadth. If the Court sought only to ensure that the President could remain neutral on the "delicate subject" of sovereign control over Jerusalem,<sup>266</sup> it could

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264. See *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting) ("The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only.").

265. See *Zivotofsky II*, 135 S. Ct. 2076, 2094 (2015) (discussing how the law would require the President to reverse long-standing, calculated policy).

266. *Id.* at 2081.

have done so on narrower and more familiar grounds. To begin with, it is not at all clear that Congress can, under the guise of regulating passports, pronounce determinations about the boundaries of a sovereign nation.<sup>267</sup> And if section 214(d) does not rest on one of Congress's enumerated powers, then the Court could have skipped the exclusivity question and instead invalidated the statute without invoking a functionalist approach to measure the President's power vis-à-vis Congress in foreign affairs.

More importantly, even if the majority opinion was "gerrymandered to the facts" of the case,<sup>268</sup> executive branch lawyers will adopt the functionalist approach of *Zivotofsky II* when advising the President on countless other matters, just as they did with *Curtiss-Wright*.<sup>269</sup>

### B. A Win for Congress

A number of scholars contend that *Zivotofsky II* is a Pyrrhic victory for the executive branch. That is primarily because the *Zivotofsky II* Court repudiated *Curtiss-Wright*'s dicta that the President is the sole actor responsible for the nation's foreign policy.<sup>270</sup> Ostensibly, *Zivotofsky II* does winnow the *Curtiss-Wright* wheat from the chaff. Justice Kennedy noted that "*Curtiss-Wright* did not hold that the President is free from Congress' lawmaking power in the field of international relations" because "it is Congress that makes laws," and "it is essential the congressional role in foreign affairs be understood

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267. Justice Thomas's opinion took this tack. *See id.* at 2103–07 (Thomas, J., concurring in part and dissenting in part) (concluding that Congress lacked such a power). In his view, the President's independent recognition power was retained in the "residual foreign affairs power" granted by Article II's Vesting Clause. *Id.* at 2096–97. There is substantial evidence that his view accords with the Founding-era's understanding of the "executive power." *See* Prakash & Ramsey, *supra* note 228, at 252–65, 311–14 (collecting sources). And because Justice Thomas maintained that Congress lacked authority "to require the President to list Israel as the place of birth for a citizen born in Jerusalem on that citizen's passport," he joined the Court in holding section 214(d) unconstitutional—at least as applied to passports—without declaring Congress powerless over all matters of recognition. *Zivotofsky II*, 135 S. Ct. at 2101 (Thomas, J., concurring in part and dissenting in part).

268. *Zivotofsky II*, 135 S. Ct. at 2121 (Scalia, J., dissenting).

269. *See, e.g.,* Destroyers Opinion, *supra* note 20, at 486–87 ("[The President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war." (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1934))). For further discussion, see also *supra* note 22 and accompanying text.

270. *Zivotofsky II*, 135 S. Ct. at 2089–90.

and respected.”<sup>271</sup> Accordingly, some argue that the mitigation of *Curtiss-Wright* will cost the executive more than was gained by prevailing over a novel passport statute.<sup>272</sup> Indeed, Professor Michael Dorf suggests that, although *Zivotofsky II* struck down an act of Congress, the decision may principally be remembered for “vindicating congressional power over foreign affairs.”<sup>273</sup>

These arguments seem ill founded. *Zivotofsky II* may be the first time that the Court has ever distanced itself from the sweeping language of *Curtiss-Wright*,<sup>274</sup> but *Zivotofsky II* also invigorates *Curtiss-Wright* by heavily relying on the institutional advantages of the executive branch.<sup>275</sup> For example, the Court insisted that recognition decisions must be made “with one voice.”<sup>276</sup> The President must be that voice because, unlike Congress, “only the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise . . . ‘decision, activity, secrecy, and dispatch.’”<sup>277</sup> That argument is a blatant *Curtiss-Wright*-ism. And now executive branch lawyers do not need to cite the discredited *Curtiss-Wright* decision: “In many contexts, OLC can switch citations from *Curtiss-Wright* to *Zivotofsky II*.”<sup>278</sup>

Indeed, far from diminishing *Curtiss-Wright*, *Zivotofsky II* fortifies its conclusion that the institutional advantages of the presidency are a valid basis for exclusive executive power. That is because the discussion of functional considerations in *Curtiss-Wright* arose not in the context of whether the President could defy Congress, but in the context of whether Congress had provided the President with too much power.<sup>279</sup> *Curtiss-Wright* was an unlawful-legislative-

271. See *id.* at 2090 (finding that *Curtiss-Wright*’s “description of the President’s exclusive power was not necessary to the holding”).

272. Dorf, *supra* note 31.

273. *Id.*

274. See Charles Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 *YALE L.J.* 1, 5 (1973) (“On several occasions the Court has rejected broad interpretations of the foreign relations power; it has nevertheless avoided directly attacking *Curtiss-Wright*.”).

275. Goldsmith, *supra* note 25, at 128–30.

276. *Zivotofsky II*, 135 S. Ct. at 2086 (quoting *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 424 (2003)).

277. *Id.* (quoting *THE FEDERALIST NO. 70*, *supra* note 28, at 424).

278. Goldsmith, *supra* note 25, at 142 n.188.

279. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315 (1936) (“The determination which we are called to make . . . is whether the Joint Resolution, as applied to [foreign affairs], is vulnerable to attack under the rule that forbids a delegation of the lawmaking power.”).

delegation case.<sup>280</sup> The Court was determining whether *Congress*, not the President, had exceeded the bounds of its authority. The unique capabilities of the executive branch are somewhat relevant in a case like *Curtiss-Wright* because Congress may have given power to the executive branch to take advantage of the unity and energy of the presidency. But in cases where the President claims authority to displace federal law, invoking the structural advantage of the executive branch *against* Congress makes *Zivotofsky II*, if anything, a stronger endorsement of functionalist arguments than *Curtiss-Wright*.

Professor Michael Glennon defends the “Pro-Congress” view on different grounds. He notes that after *Zivotofsky II* shovels dirt onto *Curtiss-Wright*’s “unbounded” vision of presidential power,<sup>281</sup> the Court favorably cites *Little* for the proposition that the executive is not insulated from the “controls and checks” of Congress just because foreign affairs are in play.<sup>282</sup> Glennon argues that because *Zivotofsky II* elevates *Little* above *Curtiss-Wright*, the Court delivered “a [b]low” to executive authority.<sup>283</sup> Glennon concludes that “nothing in *Zivotofsky* makes a presidential victory [in separation-of-powers disputes] more likely.”<sup>284</sup>

The favorable juxtaposition of *Little* against *Curtiss-Wright* is important, but Glennon carries his conclusion too far. After all, *Little* rejected the functionalist reading of the Non-Intercourse Act offered by the executive branch.<sup>285</sup> Chief Justice Marshall’s opinion acknowledged both that America was engaged in hostilities with France and that the President’s interpretation of the Act as reaching ships bound “to or from” France would be more “effect[ive]” at discouraging illicit trade.<sup>286</sup> Yet, the Court held that President Adams lacked the power to go beyond the authority Congress had delegated.<sup>287</sup> *Zivotofsky II* shows no such restraint. The same type of argument that President Adams used as a shield to defend his enforcement of a federal law, the *Zivotofsky II* Court wielded as a sword to invalidate a federal law outright.

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280. *Id.*

281. *Zivotofsky II*, 135 S. Ct. at 2089.

282. *Id.* at 2090.

283. Glennon, *supra* note 31.

284. *Id.*

285. See *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178 (1804) (noting that the “construction from the executive of the United States . . . [was] much better calculated to give [the Act] effect”).

286. *Id.*

287. *Id.* at 177–78.

## CONCLUSION

During the final stages of World War I, statesman (and future Chief Justice) Charles Evans Hughes declared that “we have a *fighting* constitution”: a Constitution animated not by a textual pragmatism but by “new applications of *unchanged* powers.”<sup>288</sup> The exigencies of World War I—the first war fought with tanks, poison gas, and submarines—did not justify “put[ting] the constitution aside as having no relation to these times.”<sup>289</sup>

That is why *Zivotofsky II*'s novel emphasis on functionalism is significant. If institutional competencies were a valid consideration when resolving disputes between the political branches, much of our constitutional history might look different. President Truman could have seized the steel mills to protect the American forces in Korea from supply shock.<sup>290</sup> President Reagan could have lawfully sold TOW antitank missiles to Iran because only he possessed “the delicate and often secret” intelligence to liberate American hostages and support anticommunist fighters in Nicaragua.<sup>291</sup> In almost every instance of presidential initiative receding to the judgment of Congress, an institutional advantage of the executive was blunted.

*Zivotofsky II*, then, is not just a case about passports. “The accretion of dangerous power,” Justice Frankfurter warned in *Youngstown*, “does not come in a day,” but over time from “unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.”<sup>292</sup> Unremarkable claims of power can reshape the separation-of-powers landscape if, by sustaining them, the Court reorients the scope and source of executive power. *Zivotofsky II* is such a decision. By pronouncing historical practice and executive competencies to be an important part of the lowest-ebb analysis, courts and administration lawyers will permit and advocate for bolder assertions of executive authority. That influence will primarily be felt

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288. Charles E. Hughes, *War Powers and the Constitution*, 2 MARQ. L. REV. 1, 18 (1917) (emphasis added).

289. *Id.* at 8.

290. See Brief for Petitioner at 98, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (No. 745), reprinted in 48 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 702–05 (1975) (contending that the Constitution’s “living and flexible meaning” gave the President “ample power to supply an army” and that Truman’s seizure of the steel mills was necessary to secure “the safety and effectiveness” of the American troops in Korea (citation omitted)).

291. *Zivotofsky II*, 135 S. Ct. 2076, 2086 (2015).

292. *Youngstown*, 343 U.S. at 594 (Frankfurter, J., concurring).

in the national security context where values like “decision, secrecy, and dispatch” have unmitigated force.